* Together with No. 18, Deckert et al. v. Pennsylvania Company for Insurances on Lives and Granting Annuities.

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TRANSCRIPT OF RECORD

Supreme Court of the United States OCTOBER TERM, 1940

No- 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL., PETITIONERS.

23.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., ET AL.

No. 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL. PETITIONERS.

418.

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPRALS FOR THE THIRD CIRCUIT

PRITTION FOR CERTIORARI PILED FEBRUARY 17, 1946.

CRETIORARI GRANTED MARCH 26, 1946.

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SUPREME COURT OF THE UNITED STATES, OCTOBER, TERM, 1940

No. 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL., PETITIONERS,

vs.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., ET AL.

No. 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL., PETITIONERS,

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THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action 218

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, and Abe Zubraw, James H. Irwin, J. H. Seiver,

INDEPENDENCE SHARES CORPORATION, a Pa. Corporation, Independence Shares Corporation, a Del. Corp., National Plan, Inc., Income Koundation, Inc., Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, Eckley B. Coxe, 3d, and The Pennsylvania Company for Insurances on Lives & Granting Annuities

Harry Shapiro, Esq., Attorney for Plaintiffs. Francis Chapman, Esq., Attorney for National Plan, Inc. Highley & Semans, Esqs., Attorney for Income Foundation, Inc.

Robert F. Irwin, Esq., Frank Rogers Donahue, Esq., Attorneys for Independence Shares Corp. of Pa., Frank McCown, Jr., R. E. Bonner, H. M. Barba and E. B. Coxe, 3d.

DOCKET ENTRIES

Mar. 11, 1939. Complaint, filed.

Mar. 11, 1939. Summons exit.

[fol. 2] Mar. 15, 1939. Motion for appointment of Receiver and Order of Court fixing time for hearing, filed.

Mar. 17, 1939. Appearance of Francis Chapman, Esq.,

for National Plan, Inc., filed.

Mar. 17, 1939. Appearance of Highley & Semans, Esqs., for Income Foundation, Inc., filed.

Mar. 17, 1939. Answer of Income Foundation, Inc., filed. Mar. 18, 1939. Stipulation of counsel that bill of complaint be dismissed as to Income Foundation, Inc., filed.

Mar. 18, 1939. Decree dismissing action as to Income

Foundation, Inc., filed.

Mar. 20, 1939. Appearance of Robert F. Irwin, Esq., and Frank Rogers Donahue, Esq., for Independence Shares

Corp., (Pa.), Frank McCown, Jr., Robert E. Bonner, Horace M. Barba & Eckley B. Coxe, 3rd, filed.

Mar. 20, 1939. Stipulation of counsel that bill of complaint be dismissed as to National Plan, Inc., filed.

Mar. 20, 1939. Decree dismissing action as to National Plan, Inc., filed. Noted 3/21/39.

Mar. 20, 1939. Answer of National Plan, Incorporated, filed.

Mar, 23, 1939. Summons returned: "on Mar. 16, 1939 served Independence Shares Corp., a Pa. corp; Independence Shares Corp., a Del. Corp.; A. H. Geary; National Plan, Inc.; Frank McCown, Jr.; R. E. Bonner; H. M. Barba; & E. B. Coxe, 3rd; and "service accepted" as to Income Foundation, and Penna. Co., etc., and filed.

[fol. 3] Mar. 23, 1939. Motion by Independence Shares Corp. (Pa.) et al., to dismiss action filed.

Mar. 23, 1939. Motion by Penna. Co., etc., to dismiss ac-

tion, filed.

Mar. 25, 1939. Motion by Independence Shares Corp. (Pa.) et al. to dismiss action as to Independence Shares Corp. (Del.) filed.

Mar. 25, 1939. Motion by Independence Shares Corp. (Pa.) et al. for order requiring production of certain documents, filed.

Mar. 25, 1939. Brief sur motion of Independence Shares Corp., et al., to dismiss, filed.

Mar. 25, 1939. Brief sur motion of Penna. Co., etc., to

dismiss; filed.

Mar. 27, 1939. Argued sur motions to dismiss and motion to strike off return of service as to Independence Shares Corp. of Del. Eo die: Motion to strike off return of service granted.

Mar. 27, 1939. Hearing,-Witness sworn.

Mar. 29, 1939. Transcript of testimony of hearing on Mar. 27, 1939, filed.

Mar. 31, 1939. Hearing resumed.

Apr. 1, 1939, Hearing resumed.

Apr. 3, 1939. Hearing resumed. Apr. 28, 1939. Hearing resumed.

May 18, 1939. Opinion, Kalodner, J., denying motions to dismiss, continuing application for appointment of Receiver and appointing special master, filed.

May 18, 1939. Decree appointing John M. Hill, Esq., Spe-

cial Master sur question of solvency of Independence Shares

Co. (Pa.), filed. 5/19/39 noted and notice mailed.

[fol. 4] May 20, 1939. Motion for preliminary injunction and Order of Court fixing time for hearing, filed. 5/22/39 Noted and notice mailed:

May 24, 1939. Exceptions on behalf of Penna. Co., filed. May 24, 1939. Argued sur motion for preliminary injunction.

May 25, 1939. Exceptions on behalf of Independence

Shares Corp., filed.

May 25, 1939. Plaintiff's amendment to caption by adding J. H. Irvin as party plaintiff and Order of Court approving same, filed. 5/26/39 Noted and notice mailed.

May 25, 1939. Plaintiff's amendment to caption by adding J. H. Van Sciver as party plaintiff and Order of Court approving same, filed. 5/26/39 Noted and notice mailed.

May 27, 1939. Answer of Independence Shares Corp.

(Pa.), et al., filed.

May 29, 1939. Stenographer's transcript of hearing of May 24, 1939, filed.

May 31, 1939. Exceptions on behalf of Penna. Co., etc.

filed:

May 131, 1939. Answer of Penna. Co., etc., filed.

June 2, 1939. Exceptions by defendants to order of Court adding parties plaintiff filed.

June 2, 1939. Order of Courty granting preliminary in-

junction, filed. 6/3/39 Noted and notice mailed.

June 3, 1939. Injunction bond in \$1,000 with Standard Accident Ins. Co., surety, and Order of Court approving bond, filed.

[fol. 5] June 5, 1939. Notice of Appeal by Independence Shares Corp., et al., filed. 6/7/39 Copy to Harry Shapiro. June 6, 1939. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

June 8, 1939, Notice of Appeal by Penna. Co., etc., filed.

6/9/39 Copy to Harry Shapiro.

June 8, 1939. Copy of Clerk's notice to U.S. Circuit Court of Appeals, filed.

June 8, 1939. Appeal bond of Penna. Co., etc., in \$250 with

Indemnity Ins. Co. of N. A., surety, filed.

June 9, 1939. Order of Special Master requiring Independence Shares Corp. to furnish information as to amounts paid in by plan holders, etc., filed.

June 9, 1939. Order of Special Master requiring Penna.

Co., etc., to furnish information as to amounts paid in by

plan holders, etc., filed.

June 15, 1939. Bond of Independence Shares Corp. et al., sur appeal in \$250 with Maryland Casualty Co., surety, filed.

June 15, 1939. Appellant's (Independence Shares Corp., et al.) designation of contents of record on appeal, filed.

June 15, 1939. Statement of points upon which appellants

Independence Shares Corp. et al.; intend to rely, filed.

June 15, 1939. Exception by Penna. Co. etc., to order of June 2, 1939 granting preliminary injunction, filed. [fol. 6]. June 15, 1939. Exceptions by Independence Shares

Corp. et al., to order of June 2, 1939, granting preliminary injunction, filed.

June 15, 1939. Exception by Independence Shares Corp. et al., to order of Special Master filed June 9, 1939, filed.

June 15, 1939. Petition of Independence Shares Corp. et al., to set aside order of Special Master dated June 9, 1939, filed.

June 16, 1939. Petition of Pennsylvania Co. etc. for review of order of Special Master filed.

June 16, 1939. Appellant's (Penna. Co.) designation of contents of record on appeal filed.

June 16, 1939. Statement of points upon which appellant Penna. Co. etc. intends to rely filed.

July 10, 1939. Appellees' Supplemental Designation of record, filed.

July 11, 1939. Appellant's additional designation of contents of record on appeal, filed.

[fol. 7]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT-Filed March 11, 1939

To the Honorable, the Judges of the Said Court:

The plaintiffs above named, on behalf of themselves and all other certificate holders and plan holders of the defendant investment companies who may, with plaintiffs' consent, lawfully join herein, bring this civil action against the defendants above named, and complain and allege upon information and belief as follows:

I. Jurisdiction and Venue

- 1. This complaint is filed, these proceedings are instituted, and the jurisdiction of this Court exists and is invoked under and by virtue of the general equitable and receivership powers and jurisdiction of this Court, including (but not to the exclusion of other acts and statutes re[fol. 8] lating to the subject matter of this civil action and the relief herein sought) Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented (Act of May 27, 1933, c. 38, Title 1, § 22 (a), 48 Stat. 86 (a), U. S. C. Title 15, § 77V (a)).
- 2. The acts and sales hereinafter described, including the hereinafter alleged violations of the said Securities Act of 1933, were and are conceived, carried out and made effective, in whole or in part, within the Eastern District of Pennsylvania. The interstate commerce and trade hereinafter recited, in whole or in part, were and are being carried on within the Eastern District of Pennsylvania. All of the defendants either are inhabitants of or have agents in and transact business within the said district.
- 3. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.

II. Description of Plaintiffs

- 4. Robert J. Deckert is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Saving Plan Contract Certificate, No. A-21768, in the sum of \$2000, dated April 4, 1938, purchased by him from Capital Savings Plan, Inc., hereinafter sometimes referred to as "Capital," since merged with and now Independence Shares Corporation (a Pennsylvania corporation), hereinafter sometimes referred to as "Independence," a defendant herein.
- 5. Roland W. Randal is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-19528, in the sum of \$2000, dated September 3, 1937, and Capital Savings Plan Contract Certificate, No. B-13415, in the sum of \$2000, dated December 6, 1937, purchased by him from Capital, now Independence, a defendant herein.
- [fol. 9] 6. David W. Compton is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and

holder of Capital Savings Plan Contract Certificate, No. A-6265, in the sum of \$2000, dated October 9, 1934, purchased by him from Capital, now Independence, a defendant herein.

- 7. R. G. Cadman is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-10660, in the sum of \$2000, dated June 22, 1936, purchased by him from Capital, now Independence, a defendant herein.
- 8. James L. Gleason is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-17552, in the sum of \$2000, dated July 27, 1937, purchased by him from Capital, now Independence, a defendant herein.
- 9. Samuel Miller is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. A-6025, in the sum of \$2000, dated July 24, 1934, purchased by him from Capital, now Independence, a defendant herein.
- 10. Irene B. Randal is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. B-7280, in the sum of \$2000, dated July 8, 1935, purchased by her from Capital, now Independence, a defendant herein.
- 11. Joseph Laky is a citizen and resident of the Common-wealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate, No. B-8765, in the sum of \$2000, dated July 30, 1936, purchased by him from Capital, now Independence, a defendant herein.
- 12. Abe Zubrow is a citizen and resident of the State of New Jersey and is the owner and holder of Capital Savings [fol. 10] Plan Contract Certificate, No. A-6188, in the sum of \$2000, dated September 5, 1934, purchased by him from Capital, now Independence, a defendant herein.

III. Description of Defendants

13. Independence Shares Corporation (a Pennsylvania corporation), hereinbefore and hereinafter sometimes referred to as "Independence," is a trust and investment corporation organized, existing and doing business under

and by virtue of the laws of the Commonwealth of Pennsylvania and is the principal defendant herein. It is the successor by merger to, and has acquired under the said merger all of the assets, liabilities, functions and business of, Capital Savings Plan, Inc., hereinbefore and hereinalter sometimes referred to as "Capital" which was an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Prior to the said merger Independence was a wholly owned subsidiary of Capital; and the officers and directors of the two corporations were substantially the same.

All of the other corporate defendants except the Pennsylvania Company for Insurances on Lives and Granting Annuities are subsidiaries or affiliates of Independence, and all of the individual defendants are officers or directors

of Independence.

14. Independence Shares Corporation (a Delaware corporation) is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between Independence Shares Corporation (a Delaware corporation) and Independence except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, interalia, that Independence Shares Corporation (a Delaware [fol. 11] corporation) assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain agreements and declarations of trust between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.

15. National Plan, Inc., is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between National Plan, Inc., and Independence except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, inter alia, that National

Plan, Inc., assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain agreements and declarations of trust between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.

- 16. Income Foundation, Inc., is an investment and trust corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland and is duly registered in Pennsylvania, and is an affiliate or subsidiary of Independence. Plaintiffs have no knowledge or means of knowledge of the exact relationship between Income Foundation, Inc., and Independence except that the registration statement filed by Independence with the Securities and Exchange Commission pursuant to the Securities Act of 1933 recites, inter alia, that Income Foundation, Inc., assigned to Independence all of its right, title and interest in and to all benefits and obligations arising out of certain declarations of trust and agreements between it and the Pennsylvania Company for Insurances on Lives and Granting Annuities dealing with certain investment shares.
- [fol. 12] 17. Alfred H. Geary, a citizen of Pennsylvania and resident of Rosemont, Pennsylvania, is a director and president and chief executive officer of Independence.
- 18. Frank McCown, Jr., a citizen of Pennsylvania and resident of Wayne, Pennsylvania, is a director and vice-president of Independence.
- 19. Robert A. Bonner, a citizen of Pennsylvania and resident of Upper Darby, Pennsylvania, is a director and secretary, treasurer, and chief financial and accounting officer of Independence.
- 20. Horace M. Barba, a citizen of Pennsylvania and resident of Philadelphia, Pennsylvania, is a director of Independence.
- 21. Eckley B. Coxe, 3d, a citizen of Pennsylvania and resident of Haverford, Pennsylvania, is a director of Independence.
 - 22. The Pennsylvania Company for Insurances on Lives and Granting Annuities, hereinafter sometimes referred to as "Trustee" is a banking corporation organized, existing

and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia, Pennsylvania, and is Trustee as hereinafter more fully set forth under several agreements between the Trustee and the defendant investment companies under which certificates and plans were sold to your complainants and other subscribers.

IV. History and Method of Doing Business of Defendant Companies

23. From and after January 1932, the trust investment companies hereinbefore named, to wit, Capital, Independence, Independence Shares Corporation (a Delaware corporation); Income Foundation, Inc., and National Plan, Inc., [fol. 13] issued and sold to subscribers certain securities generally known and denominated as "contract certificates." The contract certificates sold by Capital were and are known as "Capital Savings Plan Contract Certificates." The contract certificates sold by Independence were and are known as "Independence Trust Shares Purchase Plans." Complainants have no knowledge or means of knowledge of the exact names of the contract certificates issued by the defendants National Plan, Inc., and Income Found. Lon. Inc.

Each said investment trust company with respect to the contract certificates sold by it is hereinafter referred to as "sponsor."

24. These certificates are monthly payment plans issued and sold in unit denominations of \$1200 providing for the payment of ten dollars a month on a periodic or installment basis over a period of ten years. They were and are purchasable in one-half units of \$600 or any multiple thereof. They were and are securable with life insurance policies one of whose provisions is that upon the death of the subscriber the insurance company shall pay to the Trustee in one lump sum the installment payments remaining unpaid, which sum ranges downward on a \$1200 unit certificate, from \$1190 to \$10.

25. The Trustee upon receipt of each periodic installment payment deducted and still deducts certain various fees and charges. The said fees and charges included a service fee of \$60 on a ten dollar per month unit certificate, deducted from the equivalent of the first nine monthly payments; a

Trustee fee of 25¢ per ten dollar payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee at a standard or a sub-standard rate, deducted in proportionately decreasing amounts from each monthly payment.

. 26. The balance thereof, after the said fees and other charges were deducted, was and is used by the Trustee at the direction of the sponsor to acquire from Independence [fol. 14] "Independence Trust Shares" for the account of each subscriber. These shares are interests in a semi-fixed investment trust of which the Trustee is trustee and Independence issuer and depositor of the shares.

Thus, with respect to the contract certificates sold by Independence, Independence was depositor of the said trust shares as well as sponsor of the contract certificates, whereas, with respect to contract certificates sold by the other investment trust companies, Independence was depositor of the said trust shares and the particular investment trust company sponsor of the contract certificates.

27. Each Independence Trust Share represents a 1/1000th interest in a "Deposit Unit" previously created by Independence with funds borrowed or supplied by it. posit Unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper proportion of a distribution of capital. at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of contract certificates was and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty two common stocks which constitute the Deposit Unit as of the day prior to the date of purchase by the Trustee, plus odd lot brokerage commissions and taxes. There was and is then added an arbitrary charge or load of 9 per cent. and any distributable accumulations then applicable to the Deposit Unit. This 9 per cent. arbitrary charge was and is divided 11/2 per cent. to Independence and 71/2 per cent, to the sponsor, and it was and is a source of income to the sponsor through the ten year term in addition to the \$60 service charge which was and is deducted from the first nine payments. Independence Trust Shares were and are subject to an additional charge of 21/2 per cent. of currently distributable income and currently distributable principal which charge is deducted semi-annually and paid to the Trustee.

28. The installment investment plan of the several sponsors is in effect a trust upon a trust with two sets of trustees' [fol. 15] fees and with two sets of sponsors' fees, expenses, charges, and other costs of operation deducted from the moneys paid in by the purchasers and from the earnings derived from the underlying common stock in the portfolio of Independence Trust Shares. The Independence Trust Shares purchased by the Trustee are held in a common portfolio, but the account of each purchaser is credited with the shares or fraction of shares to which he is entitled. At any time the purchaser may demand and receive the Independence Trust Shares which are credited to his account, or the liquidating value thereof in cash. The liquidating value of each share is computed at the bids price maintained by defendant Independence and is based upon the market bid price of the forty-two common stocks underlying the shares plus the applicable portion of the distributable accumulations and less odd lot brokerage commissions The price is customarily approximately 10 per cent less than the then offering price of shares.

29. The contract certificates issued by Capital and known as Capital Savings Plan Contract Certificates were issued and sold by Capital during the period from December, 1932 until April 9, 1938.

On April 9, 1938, as a result of proceedings threatened and thereafter instituted by the Securities and Exchange Commission against Capital and Independence, as hereinafter more fully recited, the sale of Capital Savings Plan Contract Certificates was discontinued, and on December 31, 1938 as a further result of such proceedings, Capital merged with Independence and thereafter Independence issued and sold Independence Trust Shares Purchase Plans in lieu of the prior offering and sale of Capital Savings Plan Contract Certificates. The two plans are substantially similar and Independence is sponsoring, assuing and . selling Independence Trust Shares Purchase Plans with substantially the same selling organization and selling practices of Capital. In addition, Independence absorbed [fol. 16] the assets and liabilities of Capital and assumed the sponsorship of the Capital Savings Plan Contract Certificates theretofore issued by Capital.

30. Your complainants having no knowledge or means of knowledge of determining whether Income Foundation,

Inc., and National Plan, Inc., and Independence Shares Corporation, a Delaware corporation, are presently selling contract certificates. Your complainants have been informed, believe and therefore further aver, however, that although the said other corporations are technically in existence, Independence has absorbed their assets, liabilities and functions and is sponsoring the contract certificates formerly issued and s ld by such other companies.

- 31. Your complair ints have no knowledge or means of knowledge of the exact number of contract certificates or trust shares issued, sponsored, or deposited by the defendant investment trust companies. Your complainants are informed, however, believe and therefore aver that the approximate number of contract certificates in force on August 31, 1938—was not less than 30,000 on which there had been paid in by subscribers a sum in excess of \$5,000,000. According to a prospectus of Independence issued on January 3, 1939, the liquidating value of the common stocks included in the trust shares purchased by the Trustee from Independence pursuant to the said contract certificates is \$4,750,596.33.
- 32. Independence and formerly Capital maintained and still maintain offices in Philadelphia and Pittsburgh and have general agencies in Harrisburg, Johnstown, Wilkinsburg, and other cities and political subdivisions of Pennsylvania. They were and are represented, and their certificates were and are offered and sold in defined territories, by junior salesmen, senior salesmen and general agents. [fol. 17] Their sole remuneration was dependent upon commissions, and over-riding commissions based upon the amount of certificates sold, the initial commission being payable only after delivery of the certificates and being contingent thereafter upon receipt by the Trustee of subsequent installment payments. There have been more than 1200 salesmen licensed to sell contract certificates in the Commonwealth of Pennsylvania. Many of these were part time representatives, such as office workers, public employees, factory workers, school teachers and insurance salesmen. As of May 20, 1938, full time and part time representatives totalled approximately 500 persons.

- V. Violations of Securities Act of 1933; Fraud and Misrepresentation in the Sale of Contract Certificates
- 33. Independence and its predecessor Capital, in the sale of savings plan contract certificates and trust shares, by the use and means of instruments of transportation or communication in interstate commerce, and by use of the mails, directly or indirectly, have defrauded and are defrauding your complainants and other subscribers of both money and property by means of untrue statements, misrepresentations and concealments, and omissions to state material facts necessary in order to make the statements, in the light of the circumstances under which they are made, not misleading.
- 34. The foregoing fraudulent untrue statements, misrepresentations, omissions and concealments were made to your complainants and other subscribers both orally and in writing. They appear, inter alia, in certain sales bulletins entitled "Capital Savings Plan-Burton Bigelow Sales Coaching Clinic—Constructive C. S. P. Salesmanship to C. S. P. Licensed Representatives Only," which were issued by the defendant investment companies to their [fol. 18] sales representatives for use by them in the sale of contract certificates, and in prospectuses, circulars, and advertising material issues by the defendant trust investment companies to subscribers, prospective subscribers and the public generally.
- 35. Among the said fradulent, untrue statements, misrepresentations, omissions and concealments so made are the following:
- (a) That the Capital Savings Plan is comparable to a savings bank account, but paying a higher rate of interest, whereas in truth and in fact said plan is in no way comparable to a savings bank account, but is a plan of investment in the common stocks which underlie the trust shares and the principal of such investment fluctuates with the rise and fall of the market price for such common stocks.
- (1) An illustrative excerpt from Sales Bulletin No. 14 is the following:
- "For that prospect who thinks in terms of keeping his funds all in that most liquid of all forms of wealth, viz:

Cash—the-following picture phrasing has been found to be unusually effective:

Well, Mr. Lewis, as you know the accumulation of capital, like an automobile, has three speeds.

Low Gear—is the setting aside of a part of earned income in cash to be preserved intact without earnings or interest. This is the slow speed—because if you set aside \$20 a week for ten years, you would end up with only \$2400.

Second Gear—This is the placing of surplus earnings out at interest such as in a savings bank—only 3 per cent, a year at most and probably only $2\frac{1}{2}$ per cent a year. Even [fol. 19] at 3 per cent., compounded semi-annually, the deposit of \$10 a month for ten years would equal only \$1397.83. True, this is multiplication of money on a small scale—a faster way to save—but not fast enough for anyone except a very young man.

High Gear—This is the investment of surplus in the shares of solid, substantial and successful American industries where you get safety, plus a triple-source profit, viz:

- 1. Dividends from earnings.
- 2. Compounding of earning through reinvestment.
- 3. Appreciation in basic asset values comparable with the growth of the country and the prosperity of its industries.

This is real triple-leverage multiplication of your savings—principal which all rich men use to get richer—a plan now available to the man of modest income.

Incidentally, this 'Three Speeds of Capital Accumulation' story is a good one to tell a man who is a good prospect for a full-paid plan. (What follows is not strictly an example of picturizing vivid future life situations. I have inserted it at this point, however, because it fits in with the 'Three Speeds of Capital Accumulation' story—and further because so many CSP Representatives have asked for a specific idea which they can use to bag the larger cases. This presentation will positively do the business!!)"

- (2) Many of your complainants and other subscribers were induced to subscribed in the mistaken belief that the [fol. 20] said plan was a savings plan because of the inclusion of the word 'savings' in the title of the contract certificates.
- (3) An illustrative excerpt from Sales Bulletin No. 18 is the following:

"What the Prospect Says:

'I prefer to put my money into the Savings Bank.'

'I would rather buy Government Bonds!'

What the CSP representative says:

'That's fine, Mr. —. To put your money into (a Savings Bank) (Government Bond) (Baby Bonds) (The Postal Savings System) is a good idea—and if properly done, fits into the average man's savings' program very nicely. But, when we get to studying this matter of capital accumulation, Mr. —, we find that it has three speeds or three gears pretty much like an automobile.

(Tell the Three Gear Story, placing these types of savings media into Second Gear, where they belong. See Bulletin No. 14, page 2, for complete details of the Three Gears Story —.")

- (b) That the Pennsylvania Company for Insurances on Lives and Granting Annuities is "in back of and sponsors the Capital Savings Plan and manages the investment of moneys paid in by purchasers, whereas in truth and in fact such company was not at any time herein mentioned and is not now "in back of," never did and does not now sponsor the plan and never did and does not now manage the in[fol. 21] vestment of moneys paid in by the purchasers, but merely performs the ministerial act of purchasing trust shares designated by the defendant and thereafter acting as a mere custodian for the shares so purchased without any responsibility or liability whatever, except for its own misconduct as such custodian.
- (1) An illustrative excerpt from a circular entitled "Capital Savings Plan, A Trusteed Savings Investment Plan" is the following:

"Your Trustee

The investing of your money is entrusted not to Capital Savings Plan, Inc., but to your Trustee, the Pennsylvania Company for Insurances on Lives and Granting Annuities, Philadelphia."

(2) An illustrative excerpt from Sales Bulletin No. 16 is the following:

"Eight Methods of Handling Registers

1. Anticipate them.

2. Agree with the prospect; use the 'Yes, but-' answer.

3. Postpone the answer to the objection until later, so that it will not interrupt the smooth flow of your sales story.

4. Interrogate the prospect as to why he thinks his ob-

jection is true.

5. Offset the objection with some compensating advantage.

6. Capitalize the objection; turn it to your own advantage.

7. Ignore it, if trivial or insincere.

[fol. 22] 8. Deny it, vigorously and without apology. The following examples of these eight types of strategy in actual use will give you a better understanding of how to use different strategy for different cases:

1. Anticipate Them

The best of all answer to an objection is that which is given before the objection is made. An objection answered in advance loses its power to slow up a sale. To anticipate objections requires some experience and considerable advance planning of your sales presentation.

Salesman: You are anxious to know, Mr. —, what guarantees protect you in your carrying out a Capital Savings Plan Contract. You have Five guarantees, each made by those not connected with your company directly. (Here give the three guarantees—Safety, Liquidity, Earnings and the two additional guarantees made possible by the Trustees, viz:)

The Trustee guarantees that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never-receive less than \$2,000 as its matured value.

This kind of talk heads off objections such as:
'It isn't safe' or 'What guarantee do I have?' etc.''

(4) An illustrative excerpt from Sales Bulletin No. 17 is as follows:

"What the Prospect Says:

'If I buy it, will you personally guarantee it?' [fol. 23] What the CSP Representative Says:

'You bet I will—and I'll do something better than that. I'll show you how you get five guarantees—every one of them better than mine.

'Your guarantee of absolute safety is the continued operation of these strong American companies, the average age of

which is 55 years.

'Your guarantee of liquidity is the continued operation of the stock exchanges. These are open every business day and offer and maintain a market in these standard American securities.

Your guarantee of profit is the continued earnings of these 42 strong American companies in which your money

is invested.

'The trust agreement with the Trustee, The Pennsylvania Company, guarantees that if you carry your contract to completion and get all its benefits, you cannot possibly invest more than \$1200 for each \$2000 maturity.

'The Trustee's agreement likewise guarantees you that you will never get less than \$2000 upon the maturity of

your Plan.

'Now, Mr. —, with those five guarantees in front of you backed as they are by big, responsible organizations—if you still want my personal guarantee—the guarantee of a working man like yourself—I'll be delighted to give it to you!"

[fol. 24] (c) That money paid in by subscribers could be withdrawn in full at any time, or after definite periods variously represented to be one, two or three years, whereas in truth and in fact over 70 per cent of the money paid in during the first nine months under the plan with insurance are absorbed by the various fees and deductions hereinbefore set forth under title IV, and the balance is not available in cash, but can be secured only by liquidating the Independence Trust Shares which have been purchased by the Trustee for the account of the purchaser, the liquidating price of which is dependent upon the fluctuating market bid price of the common stocks which underlie such shares.

(1) An illustrative excerpt from page 22 of a prospectus issued by Capital under date of April, 1935, is the following:

"Maturity Charts

Based on the computations made by Standard Statistics Company, Inc., the following table shows the average cash value of a \$10.00 per month Contract at the end of each of the ten years as compared with the amount paid in:

		Paid in	Value
1st year	4	\$120	\$60.40
2nd year		240	206.78
3rd year		360	374.45
4th year		480.	534,95
oth year		600	719.93
6th year		720	1,049.36
7th year		840	1,179.27
8th year		960	
9th year		1,080	
10th year		1,200	1,948.28

[fol. 25] From the above it its apparent that time is one of the most important factors in the performance of the Plan. Your Contract cannot be expected to offer any substantial return for the first three or four years. Capital Savings Plan is a seven to ten year program and should be considered so by the Investor."

- (d) That for each \$1200 paid in the subscriber would receive \$2000 in cash at the end of a definite period variously stated to be from seven to fourteen years and usually stated to be ten years or less, whereas in truth and in fact, it was at all times herein mentioned and now is impossible to predict accurately the worth of the contract certificates at any definite future time as the worth thereof is at all times the liquidating value of the Independence Trust Shares which have been purchased by the Trustee for the account of the subscriber, which is dependent upon the fluctuating market bid price of the common stocks underlying such shares, which facts were not disclosed to subscribers.
- (1) An illustrative excerpt from Sales Bulletin No. 16 is the following:

"The Trustee guarantees that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never receive less than \$2000 as its matured value."

- (e) That the subscriber to a contract certificate is guaranteed against loss, whereas in truth and in fact the certificates provide no such guarantee by the defendants, the Trustee or any other person or persons.
- (1) An illustrative excerpt from Sales Bulletin No. 17 is the following:

"The trust agreement with the Trustee, the Pennsylvania Company, guarantees that if you carry your contract to [fol. 26] completion and get all its benefits, you cannot possibly invest more than \$1200 for each \$2000 maturity.

"The Trustee's agreement likewise guarantees you that you will never get less than \$2000 upon the maturity of your

Plan."

- (f) That if the subscriber had begun a Capital Savings Plan at any time from January 10, 1932, to June 10, 1934, he would have had a substantial profit as of February 3, 1937, without disclosing to purchasers that the value of the certificate is dependent upon the fluctuating market bid price of the common stocks underlying the Independence trust shares and that at all times subsequent to January 15, 1938, and at the time of said representation nearly all of Capital's contract certificates theretofore purchased showed substantial losses.
- (1) This misrepresentation is illustrated by the Maturity Chart hereinbefore recited under Paragraph 35 (c) (1). These charts appear in all of the advertising material of defendants and were the first sales material shown by the salesmen to the prospective subscribers because of their obviously fraudulent persuasive character. The said charts in addition appear in advertising pamphlets distributed to subscribers and the public.
- (g) That the contract certificates with insurance provide that upon the death of the purchaser a lump sum variously stated on unit certificates to be from \$1200 to \$2000 in cash would be immediately payable to the named beneficiary, whereas in truth and in fact the contract of insurance merely provides that upon the death of the purchaser the life insurance company will pay to the Trustee in one [fol. 27] lump sum the installment payments remaining unpaid and does not provide for the payment of any definite amount to the beneficiary under said certificate.

(1) An illustrative excerpt from Sales Bulletin No. 17 is the following:

You can cite this true-life story, an actual occurrence that happened to Al Affantranger, one of our topnotch new General Agents in the Western Division.

This was a case where Agent Affantranger let a prospect sell him the idea of procrastinating. 'I'll never be able to look that young fellow's mother in the face again,' confesses Al, 'without thinking how if I had been a real salesman, I'd have sold him that second night before Christmas—and the day after Christmas, his mother would have been \$2000 richer. But no—I let him sell me his idea—instead of me selling him my idea.'

The story is this: Affantranger had called on the young fellow who was going to take one unit; he really meant it, too. He was going to take the insurance with it. Well, he pointed out, he needed a little extra money to spend over Christmas. Come back the next pay-day and he would pay up. He was no phony—he would have done just as he promised Al. But the night before Christmas a car smacked into him—and he went West—without CSP—and his mother without the \$2000 she might have had. That procrastination didn't cost Al Affantranger so much—but it cost that boy's mother a lot."

(h) That a contract certificate is a medium of investment and a method for the installment or periodic purchase of [fol. 28] trust shares, under which the purchaser invests, and pays in, a definite sum of money over a definite period, and upon which the purchaser may receive income, profit and appreciation, without disclosing to purchasers that there is deducted from each \$1200 paid in under a Capital Savings Plan installment contract certificate a fee of \$60 to be paid to the defendant Capital out of the first \$90 paid in by the purchaser and a trustee's fee of \$30 to be deducted at the rate of 25¢ from each \$10 payment and in the installment plan with insurance additional deductions for preminums on the insurance of \$5141 for standard risks and \$77.09 for sub-standard risks, which are to be deducted in decreasing amounts from each \$10 payment, starting with 86¢ for standard risks and \$1.29 for sub-standard risks, and without further disclosing that the balance of each \$10 payment remaining after the deductions mentioned above is

used to purchase Independence trust shares at a price determined by adding an arbitrary charge or load of 9 per cent to the market price of the common stocks underlying such shares, plus the customary odd-lot brokerage commissions and taxes, and without further disclosing that the arbitrary charge or load of 9 per cent is divided 1½ per cent to the depositor of the trust shares and 7½ per cent to the sponsor of the contract certificates, and without further disclosing that Independence Trust Shares are subject to an additional charge of 2½ per cent of currently distributable income and currently distributable principal, deducted semi-annually and paid to the Trustee.

(1) An illustrative excerpt from Sales Bulletin No. 18 is the following:

[fol. 29] "What the Prospect Says:

'Why should I pay a service fee at all?'

"What the CSP Representative Says:

'Yet, when you pay the sales person who sold you, the trustee, the operators of CSP—everybody—it costs you only \$60 for each \$2000 maturity.'"

(2) An illustrative excerpt from a circular entitled "Capital Savings Plan, A Trusteed Savings Investment Plan" is the following:

"The Service Fee

The total service fee to Capital Savings Plan, Inc., is \$60 for each \$2000 maturity value contract (\$10 per month) applied for. This is payable out of deductions made during the first year's payments. The Trustee charges \$3 per year —25 cents per month—for each year the contract is in force, up to and including the first ten years.

If the \$2000 maturity value is not reached in ten years, the Trustee's charges are at the rate of \$2.40 per year for the additional length of time required."

36. Independence and heretofore Capital were and are in violation of the Securities Act of 1933 by the use of the means and instruments of transportation and communication in interstate commerce, and by the use of the mails, and they have obtained, and now are obtaining, money and

property by means of the said fraudulent untrue statements, misrepresentations, omissions and concealments, and other false pretenses.

- [fol. 30] VI. Proceedings by the Securities and Exchange Commission Against Capital Savings Plan, Inc., and Independence Shares Corporation for Violations of the Securities Act of 1933.
- 37. On June 22, 1938, the Securities and Exchange Commission, pursuant to Sections 20 (b) and 22 (a) of the Securities Act of 1933, filed a bill in equity in the District Court of the United States for the Eastern District of Pennsylvania against Capital and Independence under the caption, "Securities and Exchange Commission, plaintiff, v. Capital Savings Plan, Inc., a corporation, and Independence Shares Corporation, a corporation, defendants," as of June Term, 1938, No. 10043, charging, inter alia, that the defendants were and are engaging in acts and practices which constitute violations of Section 17 (a) of said Act and praying that the defendants be enjoined from violating any provisions of the said Act.
- 38. On June 23, 1938, the said defendants filed an answer thereto denying the alleged violations but admitting that the Court had jurisdiction and that the bill in equity stated a proper cause of action and consenting that a degree be rendered against them as prayed for in the said bill in equity.
- 39. Pursuant thereto on June 23, 1938, this Court rendered a decree against the defendants, in the form and manner prayed for by the plaintiff, a copy of which is attached hereto, made part hereof and marked Exhibit "A."
- VII. Liability of Defendant Investment Companies to Subscriber and Consequent Insolvency
- 40. Plaintiffs have been advised by counsel, believe and therefore aver that as a result of the said fraudulent, untrue statements, misrepresentations, omissions and conceal-[fol. 31] ments hereinbefore described in Part V hereof, Independence is liable to the subscribers of Capital, Independence, its subsidiaries and affiliates, under and by virtue of Sections 12 and 13 of the Securities Act of 1933 for all

moneys paid in, together with interest thereon, on contract certificates sold or issued within the three years last past.

- 41. Plaintiffs have been advised by counsel, believe and therefore further aver that irrespective of the cited sections of the Securities Act of 1933. Independence is liable, by reason of the matters hereinbefore alleged, as trustee ex maleficio with respect to all contract certificates sold, irrespective of the said three year limitation or any other time limitation whatsoever, by Capital, Independence, its subsidiaries and affiliates, and that the measure of such liability is the moneys paid in by subscribers together with interest thereon and/or the profits made of earned therewith.
- 42. The exact amount of such liability of Independence to subscribers, and the number and amount of sales of contract certificates, and the amount paid in on such contract certificates, and the profits made or earned therewith are exclusively within the knowledge, possession and control of Independence, and until and unless the relief hereinafter prayed for is granted, your complainants and other subescribers will have neither knowledge nor means of knowledge of the said facts or any of them.

Plaintiffs are informed, believe and therefore aver, however, that such liability of Independence to subscribers, exclusive of interest and/or profits, is not less than \$5,000,000.

- 43. The said liability of Independence to subscribers, but only with respect to Independence Trust Shares sold during the period from September 1, 1935, to June 14, 1938, has been admitted by Independence in a prospectus dated January 3, 1939, on pages 24 and 25, as follows:
- [fol. 32] "A contingent liability exists with respect to 1,104,869 Independence Trust Shares sold by the Registrant for the period from September 1, 1935, to June 14, 1938. The actual amount of this contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as of August 31, 1938, is estimated to be \$3,486,000 which amount represents approximately the amount actually received by the Registrant from the sale of such shares but which amount is estimated without adding interest at the rate of 6 per cent per annum or deducting distributions made to the holders of Trust Shares.

the Registrant be required to repurchase Independence Trust Shares pursuant to its contingent liability, the Registrant would, as a result of such repurchase, acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares."

- 44. Plaintiffs have been informed, believe and therefore aver that the liability of Independence with respect to Independence Trust Shares sold prior to September 1, 1935, and after June 14, 1938, when added to the said admitted liability of \$3,486,000 of Independence Trust Shares sold during the period of September 1, 1935, to June 14, 1938, exceeds, exclusive of interest and/or profits, the said sum of \$5,000,000.
- 45. The details of the fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation values of Independence Trust Shares and trust assets held by the Trustee are exclusively within the knowledge, control and possession of Independence, and until and unless the relief hereinafter prayed for is granted, your complainants and other [fol. 33] subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.
- -46. Plaintiffs are informed, believe and therefore aver that a fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation value of Independence Trust Shares and the trust assets held by the Trustee, is not sufficient in amount to pay the liabilities and debts of Independence and that Independence is therefore insolvent.

VIII. Necessity for the Appointment of a Receiver

47. The said proceedings by the Securities and Exchange Commission against Capital and Independence have been given widespread and prominent publicity in the publice press and otherwise. This publicity has been, and further like publicity will be, adverse and detrimental, and injurious to the business and continued operation of Independence. Moreover, persons interested in or acquainted with financial matters, and the public generally, having become acquainted, by reason of the aforesaid publicity, with

the real method of operation of Independence, its subsidiaries and affiliates, and the excessive fees and charges involved in the purchase of the contract certificates, now believe that the said contract certificates, because of said excessive fees and charges, will not and cannot yield any profit to subscribers.

- 48. As a result of the said adverse, detrimental and injurious publicity and the other matters, hereinbefore complained of, the sales of Independence Trust Shares Purchase Plans have virtually ceased. Notwithstanding, the expenses, sales, carrying charges and overhead incident to the maintenance of the personnel and offices of Independence have continued and will continue with the obvious result that unless the relief herein prayed for is granted, [fol. 34] the funds, assets and property of Independence will be dissipated, depleted, and wasted, to the irreparable damage and loss of your complainants and all other subscribers.
- 49. As a result of the matters bereinbefore recited, your complainants and many other subscribers have demanded, and an increasing number of subscribers are presently demanding, and will demand, from Independence, an amount equal to the sums paid in by each subscriber together with interest thereon, but without regard or relation to the limited cash surrender value set forth in the contract certificates.
 - 50. Notwithstanding the obvious and admitted liability of Independence to complainants and other subscribers, Independence has failed and refused and still fails and refuses to make payments of said liability to complainants and other subscribers.
 - 51. As a result of the matters hereinbefore alleged, suits and actions at law and in equity are threatened wherein subscribers will seek to recover in full all of the moneys paid to Independence, its subsidiaries and affiliates, together with interest thereon, but without regard to relation to the limited cash surrender value set forth in the contract certificates.
 - 52. Your complainants have been advised by counsel, believe and therefore aver that any recovery resulting from any threatened actions by individual subscribers will con-

stitute an inequitable preference on behalf of the said litigants and will deprive and tend to deprive all others of their just equity in the distributable funds of Independence; and in any event, as hereinbefore recited, the total aggregate of all of the assets of Independence is not sufficient to pay in full all of the liabilities of Independence including its liability to the said subscribers.

- 53. The details of the allegations with respect to the business and operations of Independence, its predecessor [fol. 35] Capital, and its subsidiaries and affiliates, are exclusively within the knowledge, control and possession of Independence, and until and unless the relief herein prayed for is granted, your complainants and other subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.
- 54. Your complainants have been advised by counsel, believe and therefore aver that the appointment of a receiver as hereinafter prayed for is just, necessary and proper for the following reasons:
- (a) Independence is insolvent and unable to meet its debts and liabilities.
- (b) A proper accounting of the assets, transactions, affairs and business of Independence, its predecessor Capital, and its subsidiaries and affiliates, can be properly undertaken and consummated only by a receiver appointed by the Court and not by agencies or accountants dominated by the defendants.
- (c) The appointment of a receiver will prevent a threatened and probable multiplicity of suits.
- (d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets equitably belonging to complainants and other subscribers, and will safeguard and preserve the said assets.
- (e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of litigation.
- (f) Independence, as hereinbefore recited, is a trustee ex maleficio and is therefore an improper agency to handle, liquidate or distribute the assets equitably belonging to

complainants and other subscribers. Such liquidation and distribution should be undertaken by an officer or representative of the Court only.

[fol. 36] (g) Complainants and other subscribers have no adequate remedy at law.

IX. Prayer

Wherefore, plaintiffs pray:

- (1) That summonses issue directed to each of said defendants, commanding them to appear herein and answer, under oath, the allegations contained in this complaint and to abide by such orders and decrees as the Court may make in the premises.
- (2) That preliminarily until final hearing and perpetually thereafter, a receiver for the defendants, Independence Shares Corporation (a Pennsylvania corporation), Independence Shares Corporation (a Delaware corporation), National Plan, Inc., and Income Foundation, Inc., be appointed with full power and authority, subject to the order of this Court:
- (a) to demand, sue for, collect, receive and take into his possession all the property and assets of whatsoever character or description, and wheresoever situate, of the said defendants, and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities under and pursuant to its agreements with the said defendants, and to institute, prosecute, intervene, become party to, or defend suits at laws or in equity for the protection, recovery or maintenance of any of the said property and assets.
- (b) to make an accounting of the transactions and property of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities.
- (c) to make a valuation, appraisal and audit of the assets and property of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities.
- [fol. 37] (d) to make an investigation into the business, operations and transactions of, and the relationship between

the said defendant, and the relationship of the said defendants to the Pennsylvania Company for Insurances on Lives and Granting Annuities.

- (e) to liquidate the said assets and property and to distribute the same among the persons entitled thereto.
- (f) to carry on and wind up and liquidate the business and operations of the said defendants.
- (g) to employ counsel to aid, advise and assist him in the exercise of his functions and duties.
- (h) to make application in any court of competent jurisdiction for the appointment and qualification of such ancillary receivers as may be necessary or advisable to carry out the functions and duties aforesaid.
- (i) to receive and deposit such payments as may hereafter from time to time be made by certificate holders and plan holders; and to segregate all such payments and deposit the same in a special fund separate and apart from any of the other property and assets of the said defendants and the said trust assets held by the Pennsylvania Company for Insurances on Lives and Grapting Annuities.
- (j) to determine all moneys due your complainants and other subscribers from the said defendants.
- (k) to dissolve according to law, the said defendants after their business has been wound up and their assets liquidated and distributed.
- (3) That preliminarily until final hearing and perpetually thereafter, the defendants and each of them, their agents, employees, officers and servants and all other persons, be required and commanded forthwith upon demand of said receiver to deliver up to him all and every part of the property and assets of the said defendants and the said trust assets held by the Pennsylvania Company for insurfol. 38] ances on Lives and Granting Annuities in their and each of their possession or control, wheresoever the same may be situate, including the books, records and documents of, concerning or in any way relating to, the business, operations, and transactions of the said defendants.

- (4) That preliminarily until final hearing and perpetually thereafter, the defendants and each of them, their agents, employees, officers and servants and all other persons, be enjoined and restrained from selling, transferring, assigning or disposing of, or in any manner interfering with, any of the business, property or assets of the said defendants or the said trust assets held by the Pennsylvania Company for Insurances on Lives and Granting Annuities, or interfering with the receiver in the performance of his duty or commencing or prosecuting any action in law or otherwise, against the said defendants, or against the Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee of the said trust assets, or against said receiver, without leave of this Court first had and obtained.
- (5) That preliminarily until final hearing and perpetually thereafter, the Court grant such other and further relief as the Court may deem proper.
 - (6) General relief. :

Harry Shapiro, Attorney for Plaintiffs.

[fol. 39] Duly sworn to by Isidor Ostroff. Jurat omitted in printing.

[fol. 40] EXHIBIT "A" TO COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1938

In Equity. No. 10043

SECURITIES AND EXCHANGE COMMISSION, Plaintiff

VS:

Capital Savings Plan, Inc., a Corporation, and Independence Shares Corporation, a Corporation, Defendants

FINAL DECREE

And Now, This Cause coming on to be heard this 23rd day of June, 1938; and John T. Callahan, Esq. and Edward

C. Jaegerman, Esq. personally appearing for the Plaintiff, Securities and Exchange Commission; and George-S. Munson, Esq. and Horace M. Barba, Esq. personally appearing for Defendants, Capital Savings Plan, Inc., a Pennsylvania corporation, and Independence Shares Corporation, a Pennsylvania corporation; and after giving due consideration to Plaintiff's Bill of Complaint, filed in this Court, alleging acts and practices which constitute violations of Section 17 (a) of the Securities Act of 1933; and upon further consideration of the joint Answer of the Defendants herein filed in which is admitted the jurisdiction of this Court and that the Bill of Complaint states a proper cause of action; and it further appearing that the Defendants in their joint Answer have consented that a Final Decree may be entered in these proceedings, as prayed for in Plaintiff's Bill of Complaint

New, Therefore, It Is Ordered, Adjudged and Decreed

That the defendants, and each of them, their officers, agents, employees and sales personnel be perpetually en[fol. 41] joined and restrained from, in the sale of Capital Savings Plan Contract Certificates, Independence Trust Shares, Independence Trust Shares Purchase Plans or any other security by the use of means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, obtaining money or property by means of untrue statements of material facts or omissions to state facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and particularly concerning

- (a) Any comparison of the operation of the plan to the operation of a savings bank account or other type of deposit account.
- (b) The extent to which and the time or times at which a purchaser may liquidate his securities or otherwise obtain the return of moneys paid in.
- (c) The worth or liquidating value of the security at the end of 10 years or after a total of 120 payments have been completed or at any other time subsequent to the purchase thereof.

- (d) The relationship of The Pennsylvania Company for Insurances on Lives and Granting Annuities or any other trustee to the defendants or to the operation of the plan, or the responsibility of such company or any other trustee under the plan.
- (e) Any guarantees or assurances of profit or against loss inherent in or attached to the security or any opportunities afforded thereunder.
 - (f) The life insurance feature of the plan.
- (g) The nature and the character of the operation of the plan as a medium of investment or method for the installment or periodic purchase of trust shares or the manner in which moneys paid in thereon by purchasers thereof [fol. 42] are invested in common stocks or the amount and percentage of all charges, fees, commissions, and costs which are deducted from said moneys prior to such investment or from the income or return of principal of such investment.

or any other untrue statements of material facts or other omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they are made not misleading, similar to those specifically set forth above or of similar purport or object.

By the Court.

(S.) Maris J.

[fol. 43] IN UNITED STATES DISTRICT COURT

Motion for Preliminary Injunction-Filed May 20, 1939

And Now, to wit, this nineteenth day of May, 1939, it appearing from the opinion of the District Court filed May 18, 1939 in the above-entitled matter that it is appropriate and necessary to protect and preserve the status quo of all the property and assets of the defendant Independence Shares Corporation and of all trust assets held by the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities and the right, title and interest of all plan holders in and to the said assets, come the plaintiffs, by their attorney Harry Shapiro, Esq., and move the Court to issue the following preliminary injunctions:

- (a) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be restrained and enjoined from paying over, selling, assigning, crediting, delivering, transferring or otherwise disposing of, to the defendants or any of them, directly or indirectly, in any manner whatsoever, any property, assets, funds, moneys, deposits, credits, stocks, bonds, Independence Trust Shares, Independence Trust Shares Purchase Plans, Capital Savings Plan Contract Certificates, and any and all other contracts, documents, or other matter, in any way dealing with, connected with, or arising out of the said Capital Savings Plan Contract Certificates, the said Independence Trust Shares Purchase Plans, the said Independence Trust Shares, and the trust agreements, and any other agreements between the defendants.
 - (b) That the defendants and each of them be restrained and enjoined from buying, selling, exchanging, transferring, assigning, liquidating, redeeming or otherwise dealing in or disposing of Capital Savings Plan Contract Certificates, Ladependence Trust Shares Purchase Plans, the Deposit Units of which Independence Trust Shares represent an undivided interest, Independence Trust Shares and the [fols44] shares and stocks making up or constituting the said Deposit Units
 - (c) That the defendants and each of them be restrained and enjoined from selling, transferring, paying out, delivering, assigning or otherwise dealing in or disposing of, directly or indirectly, in any manner whatsoever, to any person or persons whatsoever, the property and assets of whatsoever character or description of the defendant Independence Shares Corporation and the trust assets or funds held by the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities under its agreements with the defendant Independence Shares Corporation, its predecessors and subsidiaries and the subscribers to the various trust and savings plans and contracts issued by the said defendant Independence Shares Corporation, its predecessors and subsidiaries.
- (d) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be ordered and directed to segregate all payments made from and after March 11, 1939, the date of the filing of the complaint in

the above-entitled matter, on account of, or under and by virtue of, any trust or savings plans or certificates issued or sold by the defendant Independence Shares Corporation, its predecessors or subscribers.

(e) Such other and further preliminary relief as the Court may deem proper.

(Sgd.) Harry Shapiro, Attorney for Plaintiffs.

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER FOR HEARING-Filed May 20, 1939

Before KALODNER, J.:

And Now, to wit, this nineteenth day of May, 1939 on consideration of the foregoing motion, the Court fixes Wednesday, May 24, 1939 at 3 P. M., D. S. T. as the time and place for a hearing on the said motion. Notice of the said hearing shall be given to counsel for defendants forthwith.

By the Court.

Attest:

(Sgd.) George Brodbeck, Clerk.

P

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE PENNSYLVANIA COMPANY FOR IN-SURANCES ON LIVES AND GRANTING ANNUITIES—Filed May 31, 1939

To the Honorable Judges of Said Court:

Comes Now, The Pennsylvania Company for Insurances on Lives and Granting Annuities one of the defendants in the above entitled cause and for its answer to the bill of complaint heretofore filed against it by the above mentioned complainants defendant answers and says:

This defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities, is advised by counsel and therefore avers that this Court has no jurisdiction under allegations of the bill filed against this defendant

either under or by virtue of the general equitable powers of the Court or under the Act of Congress entitled "The Securities Act of 1933" as amended and supplemented. This defendant is advised by counsel and avers:

- [fol. 46] (A) That there is no basis for equitable relief on behalf of the complainants against this defendant, because if this defendant has any property belonging to the complainants such property can be withdrawn or liquidated immediately upon the instructions of the complainants given as required by their contract certificates and the trust agreement under which they are issued.
- (B) If the complainants have any right of action for misrepresentations against the Independence Shares Corporation such cause of action is triable only in a court of law.
- (C) Under the various trust agreements, contract certificates and purchase plans referred to in the bill, this defendant is trustee (or as to purchase plans—custodian) of definite property for approximately 20,000 persons, all of whose rights are specifically provided for in said trust agreements, contract certificates or thase plans and the complainants in this case have no cause of action or any right to interfere between these thousands of cestui que trustent and this defendant as their trustee or custodian.
- (D) While this defendant specifically denies any violations on its part of the Securities Act of 1933 as amended and has no knowledge of any violation of said act by any other defendant, this defendant is advised by counsel and therefore avers that the complainants have no right or authority as individuals, even though there had been violations of said act, to file a bill to enforce said act as to other persons, such right being the right of the Securities and Exchange Commission solely.

This defendant, therefore, requests the Court to dismiss the bill at the cost of the complainants.

For further answer to the specific averments of the bill this defendant makes answer as follows:

1. This defendant denies that any jurisdiction of this Court exists under and by virtue of the general equitable [fol. 47] receivership power and jurisdiction of this Court or under Section 22 (a) of the Act of Congress of May 27,

1933, entitled "The Securities Act of 1933" as amended and supplemented, and especially that any jurisdiction of this Court exists generally or under said Act to grant relief against this defendant.

- 2. Denied This defendant is informed, believes and therefore avers that no contract certificates or trust shares were issued and sold by the other defendants or any of them in interstate commerce or to persons other than residents of the Commonwealth of Pennsylvania during the period when no registration statement was filed with the Securities and Exchange Commission and this defendant is informed, believes and therefore avers that there have been no violations of the Securities Act of 1933 as amended.
- 3. It is denied that the matter in controversy exceeds exclusive of interest and costs the sum of \$3000.
- 4. Admitted, except that the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate, dated April 4, 1938, provided for the payment of the sum of \$1200 over a period of ten years from April 4, 1938 and there has been paid in eight payments of \$10 each, or a total of \$80.
- 5. Admitted, except the averment that the contract certificates therein referred to are each in the sum of \$1200, which averments are denied. On the contrary, it is averred that said Contract Certificate A-19528 provided for the payment of the sum of \$2400 over a period of ten years from September 3, 1937 and there has been paid in seventeen payments of \$20 each or a total of \$340 and said Contract Certificate No. B-13415 provided for the payment of \$3600 over a period of ten years from December 6, 1937 and there has been paid in sixteen payments of \$30 each, or a total of \$480.
- [fol. 48] 6. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$500 over a period of ten years from October 9, 1934 and there has been paid in fifty payments of \$5 each, or a total of \$250. Further averred that on September 16, 1936, November 2, 1938 and January 30, 1939, David W.

Compton made partial withdrawals and received the sums of \$63.71, \$50.00 and \$55.00, respectively, leaving, after deducting withdrawals, a total amount paid in of \$81.29.

- 7. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from June 22, 1936 and there has been paid in thirty payments of \$10 each, or a total of \$300.
- 8. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 27, 1937 and there has been paid in eighteen payments of \$10 each, or a total of \$180.
- 9. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 24, 1934 and there has been paid in forty-three payments of \$10 each, or a total of \$430.
- 10. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which [fol. 49] averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 8, 1935 and there has been paid in forty-six payments of \$10 each, or a total of \$460.
- 11. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 30, 1936, and there has been paid in thirty payments of \$10 each, or a total of \$300.
- 12. Admitted that Abe Zubrow is the owner and holder of Capital Savings Plan Contract Certificate No. A-6188, dated September 5, 1934, but denied that said contract certificate was in the sum of \$2000. On the contrary, it is

averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from September 5, 1934 and there has been paid in fifty payments of \$10 each, or a total of \$500. Further averred that on March 8, 1939 Abe Zubrow made a partial withdrawal and received the sum of \$300, leaving, after deducting withdrawals, a total amount paid in of \$200. This defendant after diligent inquiry has no knowledge whether the said Abe Zubrow was a citizen and resident of the State of New Jersey at the time of the filing of the complaint and demands proof thereof should the same be deemed material. It is averred that at the time Abe Zubrow purchased said contract certificate he was a citizen and resident of Pennsylvania, residing at 432 Wolf Street, Philadelphia, Pa.

- 13-14. For answer to paragraphs 13 and 14 this defendant refers to answer filed by Independence Shares Corporation and the individual defendants,
- 15-16. This defendant is advised that since these proceedings have been discontinued as against National Plan, [fol. 50] Inc., and Income Foundation, Inc., it is unnecessary to answer the averments of paragraphs 15 and 16.
- 17-21. For answer to paragraphs 17 to 21 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.
- 22. This defendant admits that it is a banking organization organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania, and that it is trustee under certain trust agreements with Capital Savings Plan, Inc. (now Independence Shares Corporation) and with Independence Shares Corporation, including an agreement dated May 1, 1934 under which Capital Savings Plan Contract Certificates were issued to the complainants. This defendant further avers that it is custodian for each of the individual purchasers under Independence Trust Shares Purchase Plans and is trustee under an agreement dated April 2, 1930, as supplemented, with Independence Shares Corporation pursuant to which Independence Trust Shares are issued.
- 23-32. For answer to paragraphs 23 to 32 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.

33-35. This defendant at no time has participated in the offer or sale to the public of Capital Savings Plan Contract Certificates, Independence Trust Shares or Independence Trust Shares Purchase Plans and wers that except as to the matters hereinafter mentioned the averments of paragraphs 33-35 are peculiarly within the knowledge of the other defendants, and this defendant demands proof thereof upon issue joined between the complainants and said other defendants. This defendant avers that each of the complainants was a resident of the Commonwealth of Pennsylvania or represented himself so to be at the respec-[fol. 51] tive times of the issuance of his contract certificate. that no interstate commerce was involved in the issuance of contract certificates to them and that not one of the complainants has at any time reported any misrepresentations to this defendant.

36. Denied. This defendant avers that on information and belief no Capital Savings Plan Contract Certificate was sold or issued outside the Commonwealth of Pennsylvania or to any person who was not a resident of the Commonwealth of Pennsylvania or represented himself so to be, and is advised by counsel, believes and therefore avers, that there were no violations by Capital Savings Plan, Inc., of the Securities Act of 1933 as amended in view of subsection 11 of Section 3 of said act. This defendant further avers on information and belief that no Independence Trust Shares were sold by Independence Shares Corporation or Capital Savings Plan, Inc., during the period when Independence Trust Shares were not registered with the Securities and Exchange Commission outside the Commonwealth of Pennsylvania or to any person who was not a resident of the Commonwealth of Pennsylvania or represented himself so to be, and is advised by counsel and therefore avers that under this state of facts there were no violations of the Securities Act of 1933 as amended in the sale of Independence Trust Shares. This defendant has no information which would lead it to believe that there have been any violations of the Securities Act of 1933 since the registration of Independence Trust Shares and Independence Trust Shares Purchase Plans in June of 1938 and therefore denies on information and belief that there have been any violations of the Securities Act of 1933 as amended by Independence Shares Corporation or Capital Savings Plan, Inc., since the effective dates of said registrations.

- 37-39. For answer to paragraphs 37 to 39 inclusive this defendant refers to the answer filed by Independence Shares Corporation and the individual defendants.
- [fol. 52] 40. Denied. This defendant is advised by counsel that under the facts in this case as known to this defendant and its counsel, neither Capital Savings Plan, Inc., nor Independence Shares Corporation is liable to any holder of Capital Savings Plan Contract Certificates nor Independence Trust Shares Purchase Plans, or holder of Independence Trust Shares, under any provision of the Securities Act of 1933 as amended.
- 41. This defendant is advised that the averments of paragraph 41 state a conclusion of law which need not be admitted or denied.
- 42. Denied. As averred above this defendant is advised by counsel that there is no such liability as averred.
- 43. Admitted that the prospectus dated January 3, 1939 for Independence Trust Shares contained the language averred in paragraph 43. This defendant is advised by counsel that no contingent liability whatsoever exists with respect to the number of trust shares mentioned in the prospectus or in connection with any trust shares subsequently sold.
- 44. For the reasons set forth in paragraph 43 and here-tofore, this defendant denies upon the advice and opinion of its coursel that any liability whatsoever exists with respect to any Independence Trust Shares sold.
- 45. Denied. This defendant avers that it, as Trustee under the Agreement of May 1, 1934, keeps complete and accurate accounts of the number of trust shares held for each and every holder of Capital Savings Plan Contract Certificate; that each of the complainants at all times were and are at liberty to request this defendant to advise them of the number of trust shares so held for them and that certain of the complainants have from time to time made such requests of this defendant which have been complied [fol. 53] with. This defendant further avers that the bid price of Independence Trust Shares is quoted daily in the newspaper so that the complainants can for themselves determine the current value of the trust shares held for them and that under the terms of said Trust Agreement of

May 1, 1934, no Capital Savings Plan Contract Certificate holder is in any way concerned with or interested in the number of trust shares held for other contract certificate holders.

46. This defendant is advised by counsel, believes and therefore avers that the averments of paragraph 46 are irrelevant and immaterial in so far as the trust assets held by this defendant are concerned. This defendant is advised by counsel, believes and therefore avers that under no circumstances can any of the trust assets held by this defendant as Trustee for the benefit of the holders of Capital Savings Plan Contract Certificates, nor any of the trust assets held by this defendant as Trustee for the holders of Independence Trust Shares, nor any of the 'trust assets held by this defendant as custodian for the purchasers under Independence Trust Shares Purchase Plans, be applied toward the payment of any debts or liabilities of Independence Shares Corporation and that any such application would be a gross breach of the respective trusts and custodianships administered by this defendant.

47-54. The averments of paragraphs 47-54 inclusive are denied in so far as they refer to the necessity or advisability of the appointment of a receiver for any of the trust assets held by this defendant or the advisability of the appointment of a receiver for Independence Shares Cor-This defendant avers that it has at all times administered the various trusts and custodianships imposed upon it by the various trust agreements, contract certificates and plans strictly in accordance with the terms thereof, and that in so far as the Capital Savings Plan Contract Certificates and Independence Trust Shares Purchase Plans are concerned, it at all times keeps an accurate rec-[fol. 54] ord of the exact number of trust shares held from time to time for each and every contract certificate holder or purchaser; that the terms of said contract certificates and plans provide that this defendant is bound to continue its duties so long as the respective contract certificate holders or purchasers are not in default until all required payments have been made; that this defendant is able to administer · the duties imposed upon it by said contract certificates and plans by reason of the use of mechanized accounting equipment and that the administration of said trust assets by a

receiver would necessitate great and unjustified cost and expense to contract certificate holders and purchasers; that a very large number of contract certificate holders and purchasers are maintaining their payments and apparently desire to continue to make their payments and investments and that their right to do so would be violated by the appointment of a receiver of the trust assets for the announced purpose of liquidating as set forth in the bill of complaint; that as averred above the trust under which Independence Trust Shares are issued is administered separate and apart from the trusts and custodianships relating to the contract certificates and plans, and there are approximately 1400 registered holders of Independence Trust Shares, the vast majority of whom have no connection or concern whatsoever with these proceedings and that under the terms of the Capital Savings Plan Contract Certificates there is in effect a group life insurance policy insuring some 6800 lives to the extent of some \$5,000,000, all of which insurance would lapse in the event a receiver should be appointed. This defendant further avers that the continuation of the contract certificates and plans for the benefit of the holders and purchasers who desire to continue the same is largely dependent upon the continued conduct of the business of Independence Shares Corporation since that company creates the new units of Independence Trust Shares which this defendant is directed to purchase, and that an appointment of a receiver in these proceedings for Independence Shares [fol. 55] Corporation would prevent the carrying out of the terms and purposes of the contract certificates and plans held by those who do not desire to withdraw or liquidate at this time but who desire to continue to make their payments. This defendant further avers that the appointment of a receiver for the trust assets for the purpose of liquidation would result in liquidation at the present depressed market prices contrary to the desires of a large number of holders of contract certificates and plans and contrary to the desires of a large number of holders of Independence Trust Shares who have no interest or concern with these proceedings.

This defendant, therefore prays the Court to dismiss, this bill at the cost of the complainants and to relegate these complaints and any others similarly situated to their

actions at law, if any they have, against Independence Shares Corporation.

Saul, Ewing, Remick & Saul, By (Sgd.) Francis H. Bohlen, Jr., Attorneys for Defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 56] IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF INDEPENDENCE SHARES CORPORATION, A PENNSYLVANIA CORPORATION, ALFRED H. GEARY, FRANK McGowan, Jr., Robert A. Boner, Horace M. Barba and Eckley B. Coxe, 3D—Filed May 27, 1939

To the Honorable Judges of Said Court:

Comes Now, Independence Shares Corporation, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and Alfred H. Geary, Frank McGowan, Jr., Robert A. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, some of the defendants in the above-entitled cause, and for their answer to the bill of complaint heretofore filed against them therein by Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, and Abe Zubrow, the complainants, the defendants jointly and severally answer and say:

I. Jurisdiction and Venue

- · 1. Denied that jurisdiction of this Court exists under and by virtue of the general, equitable and receivership powers and jurisdiction of the Court, and denied, that in this case, Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented, gives this Court jurisdiction.
- 2. Admitted that the sales to Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow took place in Pennsylvania, but the acts referred to and the alleged violations of the Securities Act of 1933 are denied. It is further averred that defendant Independence Shares Corporation, a Delaware corporation,

was dissolved by the State of Delaware on December 12, 1935.

[fol. 57] 3. Denied that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.

II. Description of Plaintiffs

- 4. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate, dated April 4, 1938, provided for the payment of the sum of \$1200 over a period of ten years from April 4, 1938 and there has been paid in eight payments of \$10 each, or a total of \$80.
- 5. Admitted, except the averment that the contract certificates therein referred to are each in the sum of \$2000, which averments are denied. On the contrary, it is averred that said Contract Certificate No. A-19528 provided for the payment of the sum of \$2400 over a period of ten years from September 3, 1937 and there has been paid in seventeen payments of \$20 each, or a total of \$340, and said Contract Certificate No. B-13415 provided for the payment of \$3600 over a period of ten years from December 6, 1937 and there has been paid in sixteen payments of \$30 each, or a total of \$480.
- 6. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$600, over a period of ten years from October 9, 1934 and there has been paid in fifty payments of \$5 each, or a total of \$250. Further averred that on September 16, 1936, November 2, 1938 and January 30, 1939, David W. Compton made partial withdrawals and received the sums of \$63.71, \$50 and \$55, respectively, leaving, after deducting withdrawals, a total amount paid in of \$81.29.
- 7. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000; which [fol. 58] averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from June 22, 1936 and there has been paid in thirty payments of \$10 cach, or a total of \$300.

- 8. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 27, 1937 and there has been paid in eighteen payments of \$10 each, or a total of \$180.
- 9. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 24, 1934 and there has been paid in forty-three payments of \$10 each, or a total of \$430.
- 10. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 8, 1935 and there has been paid in forty-six payments of \$10 each, or a total of \$460.
- 11. Admitted, except the averment that the contract certificate therein referred to is in the sum of \$2000, which averment is denied. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from July 30, 1936, and there has been paid in thirty payments of \$10 each, or a total of \$300.
- [fol. 59] 12. Admitted that Abe Zubrow is the owner and holder of Capital Savings Plan Contract Certificate No. A-6188, dated September 5, 1934, but denied that said contract certificate was in the sum of \$2000. On the contrary, it is averred that said contract certificate provided for the payment of the sum of \$1200 over a period of ten years from September 5, 1934, and there has been paid in fifty payments of \$10 each, or a total of \$500. Further averred that on March 8, 1939, Abe Zubrow made a partial withdrawal and received the sum of \$300, leaving, after deducting withdrawals, a total amount paid in of \$200. These defendants after diligent inquiry have no knowledge whether the said Abe Zubrow is a citizen and resident of the State of New Jersey and demand proof thereof should the same be

deemed material. It is averred that at the time Abe Zubrow purchased said contract certificate he was a citizen and resident of Pennsylvania, residing at 432 Wolf Street, Philadelphia, Pa.

III. Description of Defendants

13. Admitted that Independence Shares Corporation is a defendant, but denied that it is the principal defendant, and denied that the other corporate defendants are subsidiaries or affiliates of Independence Shares Corporation, a Pennsylvania corporation. On the contrary, it is averred that Independence Shares Corporation, a Pennsylvania corporation has no subsidiaries or affiliates. As to Independence Shares Corporation, of Delaware, it is averred that said corporation was dissolved by the State of Delaware on December 12, 1935. Further denied that Independence Shares Corporation, a Pennsylvania corporation, is or Capital Savings Plan, Inc., was a trust and investment corporation. It is further averred that Independence Shares Corporation is organized for the purposes, as follows:

"To acquire in any manner, hold as investment, guarantee, sell assigns, transfer, mortgage, pledge, exchange or otherwise dispose of shares, stocks, debentures, bonds, [fol. 60] trust share certificates, certificates of interest or deposit, notes, obligations and securities issued by any corporation or by any trustee, or government or governmental authority, and while the owner thereof to exercise all the rights, powers and privileges of ownership; to establish one or more trust funds by agreement with a trustee or trustees for the benefit of this corporation and/or of holders of trust share certificates or certificates of interest or of deposit in and to such fund or funds; to pledge, deposit, or deliver to a trustee or trustees securities and/or other property for the benefit of this corporation and/or of the holders of such trust share certificates or certificates of interest or of deposit to be issued and/or authenticated by this corporation and/or a trustee or trustees, evidencing the right of the holder of such trust share certificates or certificates of interest or of deposit to participate or share in income from and/or to demand the delivery of such securities so pledged, deposited or delivered, and the accumulated participation or share in income thereon, if any, or the proceeds of the sale thereof, or any part thereof, either upon demand or at some

future certain or uncertain time, upon the terms and conditions contained in the agreement relating to such pledge, deposit or delivery, and the transaction of all lawful business incidental to the foregoing."

and Capital Savings Plan, Inc., was organized for the purpose of

"purchasing, acquiring, investing in, holding, selling and dealing in stocks, bonds, debentures, notes, mortgages, leases, obligations, contracts and other securities or evidences of indebtedness, and the transaction of all such business as is necessary and incidental thereto."

It is further averred that the character of the business carried on by Independence Shares Corporation, of Penn-[fol. 61] sylvania, has been and still is the purchase with its own funds of units, each unit at present consisting of one share of the common stock of the following corporations:

American Gas and Electric Company American Telephone and Telegraph Company Pacific Lighting Corporation Allied Chemical & Dye Corporation Allis-Chalmers Manufacturing Company American Can Company The American Tobacco Company (Class "B" Stock) Corn Products Refining Company E. I. duPont de Nemours & Company Eastman Kodak Company General Electric Company General Motors Corporation International Harvester Company Union Carbide and Carbon Corporation United States Steel Corporation Westinghouse Electric & Manufacturing Company F. W. Woolworth Company The Atlantic Refining Company Standard Oil Company of California Standard Oil Company (Indiana) Standard Oil: Company (New Jersey) The Texas Corporation The Atchison, Topeka and Santa Fe Bailway Company The Chesapeake and Ohio Railway Company The Pennsylvania Railroad Company

Union Pacific Railroad Company
The Chase National Bank of the City of New York
Continental-Illinois Bank and Trust Company (Chicago)
The First National Bank of Boston
The Manhattan Company (New York)
The National City Bank of New York
Aetna Life Insurance Company (Hartford)
Fidelity-Phenix Fire Insurance Company of New York
Home Insurance Company of New York
Insurance Company of North America (Philadelphia)

[fol. 62] in accordance with an agreement and declaration of trust dated as of April 2, 1930, with The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (see Exhibit P-30) which units of stocks are deposited with and held by The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, and against each unit of stock said Trustee issued 1000 Independence Trust Shares. These trust shares have been and are being sold to or for the account of holders of installment or fully paid investment plans or contracts, which plans or contracts by their terms require the payments made thereunder to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee or Custodian, to be applied to the purchase of Independence Trust Shares. In addition, Independence Shares Corporation, of Pennsylvania, has been and now is the issuer of Independence Trust Shares Purchase Plans of the installment and full-paid types, pursuant to the terms of which plans the holders thereof authorize and direct the payments made thereunder to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Custodian, to be applied, after deductions, to the purchase of Independence Trust Shares. It is further averred that the character of the business of Capital Savings Plan, Inc., was, prior to April 9, 1938, the issuance and sale of Capital Savings Plan Contract Certificates under a trust agreement dated May 1. 1934, between it and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (see Exhibit C-14), solely to residents of the Commonwealth of Pennsylvania, pursuant to the terms of which contract certificates the purchaser thereof makes payments to the Trusttee and authorizes and directs the Trustee to apply the payments made thereunder, after deductions, to the purchase of Independence Trust Shares. It is further averred that no Capital Savings Plan Contract Certificates have been issued or sold since April 9, 1938, and no contract certificates will be sold in the future.

[fol. 63] 14. Denied that Independence Shares Corporation, a Delaware corporation, is or was an investment and trust corporation organized and existing and doing business under and by virtue of the laws of the State of Delaware, and denied that said Delaware corporation is an affiliate or subsidiary of Independence Shares Corporation, a Pennsylvania corporation. On the contrary, it is averred that Independence Shares Corporation, a Delaware corporation, distributed all of its assets and was dissolved by the State of Delaware on December 12, 1935.

15. Denied. In further answer to this paragraph, defendants aver that on March 20, 1939, this Court entered the following decree dismissing the bill as to National Plan, Inc.

And Now, this 20th day of March, 1939, upon consideration of the stipulation of counsel filed herein this day by Harry Shapiro, Esq., attorney for the plaintiffs named in the above entitled action, and Francis Chapman, Esquire, attorney for National Plan, Incorporated, one of the defendants named therein, which said stipulation recites the following agreed facts: That defendant, National Plan, Incorporated, was joined as a party defendant in the above entitled case through error; That the defendant, National Plan, Incorporated, is not a subsidiary or affiliate of any of the other defendant companies named in the above recited action, nor is the defendant, National Plan, Incorporated, associated with any of the other defendants named therein, except that the defendant The Pennsylvania Company for Insurances on Lives and Granting Annuities is a duly constituted Custodian (formerly known as Trustee), for the said National Plan, Incorporated, under the terms of a certain trust agreement between National Plan Incorporated and The Pennsylvania Company for Insurances on Lives and Granting Annuities, which said agreement is entirely separate and apart from any agreement which the [fol. 64] said The Pennsylvania Company for Insurances on Lives and Granting Annuities may have with any other of the said defendants; That all of the averments in the Bill of Complaint filed alleging insolvency of the defendant,

National Plan, Incorporated, assignment of its right, title and interest to Independence Shares Corporation, and all averments alleging facts, directly or indirectly, detrimental to the defendant, National Plan, Incorporated, or the conduct of its business, are without foundation in fact; and it further appearing that the plaintiffs in the said action, by their attorney, Harry Shapiro, Esq., has consented to and requested the Court to enter an order or decree dismissing the Bill of Complaint/herein filed as to the defendant, National Plan, Incorporated, with costs to be paid by the said plaintiffs.

Now Therefore, It Is Ordered and Decreed that the Bill of Complaint is dismissed as to the defendant, National Plan, Incorporated, with costs to be paid by the plaintiffs.

(s) Kalodner, J.

16. Denied. In further answer to this paragraph, defendants aver that on March 18, 1939, this Court entered the following decree dismissing the bill as to Income Foundation, Inc.

And Now, this 18th day of March, 1939, upon consideration of the stipulation of counsel filed herein this day by Harry Shapiro, Esq., attorney for the plaintiffs named in the above entitled action and Edwin W. Semans, Esq., attorney for Income Foundation, Inc., one of the defendants named therein, which said stipulation recites the following agreed facts: That the defendant, Income Foundation, Inc. was joined as a party defendant in the above entitled case through error; That the defendant, Income Foundation, Inc. [fol. 65] is not a subsidiary or affiliate of any of the other defendant companies named in the above recited action, nor is the defendant, Income Foundation, Inc. associated with any of the other defendants named therein, except that the defendant The Pennsylvania Company for Insurances on Lives and Granting Annuities is a duly constituted Trustee for the said Income Foundation, Inc. under the terms of a certain trust agreement between Income Foundation, Inc. and The Pennsylvania Company for Insurances on Lives and Granting Annuities, which said agreement is entirely separate and apart from any agreement which the said The Pennsylvania Company for Insurances on Lives and Granting Annuities may have with any other of the said defendants; that all of the averments in the Bill of ComPlaint filed alleging insolvency of the defendant, Income Foundation, Inc. assignment of its right, title and interest to Independence Shares Corporation, and all averments alleging facts, directly or indirectly, detrimental to the defendant, Income Foundation, Inc., or the conduct of its business, are without foundation in fact; and it further appearing that the plaintiffs in the said action, by their attorney, Harry Shapiro, Esq., has consented to and requested the Court to enter an order or decree dismissing the Bill of Complaint herein filed as to the defendant, Income Foundation, Inc. with costs to be paid by the said plaintiffs.

Now Therefore, It is ordered and decreed that the bill of complaint is dismissed as to the defendant, Income Foundation, Inc., with costs to be paid by the plaintiffs.

(s) Kalodner, J.

17. Admitted.

18. Admitted.

19. Admitted

[fol. 66] 20. Admitted.

21. Admitted.

22. Admitted, but denied that Independence Shares Corporation, Pennsylvania, is an investment corporation. On the contrary, it is averred that Independence Shares Corporation is a corporation whose functions are as described in paragraph 13 of this answer. Further averred, that the bill has been dismissed as to National Plan, Inc., and Income Foundation, Inc., as more fully appears in paragraphs 15 and 16 of this answer, and further averred that Independence Shares Corporation, of Delaware, was dissolved by the State of Delaware on December 12, 1935.

IV. History and Method of Doing Business of Defendant Companies

23. Admitted, but denied that Independence Shares Corporation, Pennsylvania, is a trust investment company. On the contrary, it is averred that Independence Shares Corporation is a corporation whose functions are as described in paragraph 13 of this answer and the averments as to Independence Shares Corporation, of Delaware, Nat

tional Plan, Inc., and Income Foundation, Inc., are denied for the reasons set forth in paragraphs 14, 15 and 16 of this answer.

24. Admitted, but denied that Capital Savings Plan Contract Certificates, either with or without life insurance, are now purchasable. It is averred that no Capital Savings Plan Contract Certificates have been purchasable since April 9, 1938. The averments of this paragraph of the bill as to Independence Trust Shares Purchase Plans are admitted, except that it is denied that they were or are purchasable in one-half units of \$600, or that they were or are securable with life insurance policies. Further denied that as to Independence Trust Shares Purchase Plans any payments are made to a Trustee. On the contrary, it is averred [fol. 67] that all payments made on such plans are paid to a custodian, The-Pennsylvania Company for Insurances on Lives and Granting Annuities.

25. Admitted as to Capital Savings Plan Contract Certificates, but denied as to Independence Trust Shares Purchase Plans. On the contrary, it is averred that as to such purchase plans no insurance is available and that the fees and expenses are and have been, as set forth in a prospectus of Independence Trust Shares Purchase Plans (see Exhibit C-8) and in the plans themselves, specimen copies of which are attached to and made a part hereof.

On the contrary, it is averred that as to 26. Denied. Capital Savings Plan Contract Certificates, the payments made to The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, were applied, after deductions of fees and other charges, by the Trustee, at the direction of the holder of the contract certificate, to the purchase of Independence Trust Shares. As to Independence Trust Shares Purchase Plans, it is averred that there is no Trustee, but The Pennsylvania Company for Insurances on Lives and Granting Annuities is the custodian, and the custodian, after the deduction of the fees and charges, as set forth in said prospectus (see Exhibit C-8), applies the payments at the direction of the holder of the purchase plan to the purchase of Independence Trust Shares. It is further averred that Independence Shares Corporation has never sold or sponsored the sale of any contract certificates.

27. Admitted, except it is averred that since February 28, 1939 a deposit unit has consisted of one share of each

of the common stocks of 35 corporations and not 42 corporations, and denied that 9 per cent was an arbitrary load or charge, but on the contrary, it is averred that said 9 per cent represents the value of the services rendered by Independence Shares Corporation in purchasing underlying securities, depositing them with the Trustee, and the creation [fol. 68] and issuance of trust shares and the cost of marketing the same. It is admitted that prior to May 2, 1938, of the said 9 per cent charge, 11/2 per cent was retained by Independence Shares Corporation and 71/2 per cent was paid to Capital Savings Plan, Inc., for marketing the shares, and it is further averred that as of May 2, 1938 the said charge was . reduced to 71/2 per cent and from said date to December 31, 1938 was divided 11/2 per cent to Independence Shares Corporation and 6 per cent to Capital Savings Plan, Inc., and that since January 1, 1939 all of said 71/2 per cent charge has been retained by Independence Shares Corporation, which corporation now performs the functions formerly performed by both corporations. Denied that after February 28, 1939 Independence Trust Shares are subject to an additional charge of 21/2 per cent of currently distributable income and currently distributable principal, which charge is deducted semi-annually and paid to the Trustee. On the contrary, it is averred that there is an administration fee as set forth on pages 6 and 7 of said prospectus (See Exhibit C-8), computed in accordance with standard rates fixed by The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, for transactions involved in the administration of the trust during the preceding six months' period, but in no event can such be in excess of the amount of 1¢ semi-annually for each trust share issued and outstanding on February 28th and August 31st of each year. All fees and charges on trust shares are fully explained and set forth in the Independence Trust Shares said prospectus. (See Exhibit C-8.)

28. Denied that the Capital Savings Plan Contract Certificates held by the various complainants constitute in effect a trust upon a trust with two sets of Trustee's fees and with two sets of sponsor's fees. On the contrary, it is averred that Capital Savings Plan Contract Certificates are based upon two distinct trust instruments and involve only one sponsor's fee and two Trustee's fees. These fees are fully set forth in said prospectus (See Exhibit C-8) and in

[fol. 69] paragraph 46 of this answer. Denied that the liquidating value of each Independence Trust Share is computed at the bid price maintained by Independence Shares Corporation and is based upon the market price of the 42 common stocks underlying the shares, plus the applicable portion of the distributable accumulations and less odd-lot brokerage, commissions and taxes. On the contrary, it is averred that the liquidating value or redemption price of trust shares is in no way maintained by Independence Shares Corporation, but is based on the actual market value of the common stocks underlying the shares, and is payable by the Trustee from funds already in its hands. Independence Shares Corporation has the option to purchase any shares surrendered to the Trustee for redemption and Independence Shares Corporation has adopted the practice, when it exercises such option, of purchasing the shares at the creation price, which price is higher than the redemption & price, for the reason that brokerage, commissions and taxes are included in the creation price, whereas such items are deducted in calculating the redemption price. Denied that the redemption or liquidating price is customarily approximately 10 per cent less than the then offering price of trust shares. On the contrary, it is averred that the offering price (in which is included the 71/2 per cent charge referred to in paragraph 27) is only approximately 9 per cent greater than the redemption or liquidation price.

29. Admitted that Capital Savings Plan Contract Certificates were issued and sold by Capital Savings Plan, Inc., during the period from December 1932 until April 9, 1938. Denied that on April 9, 1938, as a result of proceedings threatened and thereafter instituted by the Securities and Exchange Commission against Capital Savings Plan, Inc., and Independence Shares Corporation, the sale of Capital Savings Plan Contract Certificates was discontinued: On the contrary, it is averred that the sale of Contract Certifi-, cates ceased on April 9, 1938 as a result of an understanding between Capital Savings Plan, Inc, Independence [fol. 70] Shares Corporation and the Securities and Exchange Commission. Denied that as a result of the proceedings instituted by the Securities and Exchange Commission, Capital Savings Plan, Inc., merged with Independence Shares Corporation. On the contrary, it is averred that said merger was brought about to simplify operations and

to effect economies in operations entirely apart from the Securities and Exchange Commission proceedings. Admitted that after December 31, 1938 Independence Shares Corporation issued and sold Independence Trust Shares Purchase Plans, and it further averred that Independence Shares Corporation commenced the issuance of Independence Trust Shares Purchase Plans on June 14, 1938, at which time the registration statement was made effective by the Securities. and Exchange Commission, and which plans between said date and December 31, 1938 were sold by Capital Savings Plan, Inc. Denied that Independence Trust Shares Purchase Plans are being sold in lieu of the prior offering and sale of Capital Savings Plan Contract Certificates. On the contrary, it is averred that prior to said merger Independence Shares Corporation never had the right to issue Capital Savings Plan Contract Certificates, and that prior to said merger Capital Savings Plan, Inc., never had the right to issue Independence Trust Shares Purchase Plans, and further, that since said merger no right to issue Capital Savings Plan Contract Certificates has existed. Further denied that Independence Shares Corporation has assumed the sponsorship of the Capital Savings Plan Contract Cer-On the contrary, it is averred that no Capital Savings Plan Contract Certificates have been issued since April 9, 1938, and with respect to the contract certificates theretofore issued, Independence Shares Corporation has undertaken the duty of supplying Independence Trust Shares to the Trustee for Capital Savings Plan Contract Gertificate holders, so that the payments made to such . Trustee may be invested in trust shares as required under the terms of the contract certificates.

[fol. 71] 30. Denied for the reason that the bill has been dismissed as to Income Foundation, Inc., and National Plan, Inc., as more fully appears in paragraphs 15 and 16 of this answer, and that Independence Shares Corporation, of Delaware, has been dissolved as more fully appears in para-

graphs 13 and 14.

31. Denied that Independence Shares Corporation is an investment trust company for the reasons more fully set forth in paragraph 13 of this answer. Further denied that on August 31, 1938, the approximate number of contract certificates in force was not less than 30,000. On the contrary, it is averred that on August 31, 1938, the approximate number of contract certificates then in force was 20,

- 000: Denied that the liquidating value of the common stocks held by the Trustee for the holders of trust shares was, as shown by the prospectus dated January 3, 1939, as of August 31, 1938, \$4,750,596.33. On the contrary, it is averred that said prospectus shows said market value as of said date to be \$4,075,596.33.
- 32. Admitted, except that it is averred that 1200 salesmen referred to were licensed during a period of approximately seven years prior to June, 1938, that the greatest number of salesmen licensed at any one time was 625, and that Independence Shares Corporation had on March 11, 1939, 186 sales representatives.
- V. Violations of the Securities act of 1933, Fraud and Misrepresentation in the Sale of Contract Certificates
- 33. Denied that from May 1, 1934, to April 9, 1938, either Independence Shares Corporation or Capital Savings Plan, Inc., was engaged in interstate commerce, and denied that at any time either Independence Shares Corporation or Capital Savings Plan, Inc., in the sale of trust shares or contract certificates, by the use and means of instruments of transportation or communication in interstate [fol. 72] commerce and by use of the mails, have directly or indirectly defrauded or are defrauding the complainants and other subscribers of both money and property by means of untrue statements, misrepresentations or concealments or omissions to state material facts necessary in order to make the statements in the light of the circumstances under which they are made, not misleading. . It is further averred that no Capital Savings Plan Contract Certificates have been sold since April 9, 1938.
- 34. Denied that Independence Shares Corporation or Capital Savings Plan, Inc., either were or are investment companies for the reasons more fully set forth in paragraph. 13 of this answer. Further denied that any fraudulent, untrue statements, misrepresentations, omissions or concealments were made to your complainants or others, either orally or in writing, and denied that the "Capital Savings Plan—Burten Bigelow Sales Coaching Clinic..." bulletins were issued to sales representatives for use by them in the sale of contract certificates. On the contrary, it is averred that said bulletins were used only between February and June, 1937, and solely in a course of instruction

of sales representatives to develop salesmanship, and denied that any untrue statements, misrepresentations, omissions and concealments were contained in prospectuses, circulats or advertising material issued by Capital Savings Plan, Inc., or Independence Shares Corporation.

35. Denied that defendants made any fraudulent, untrue statements, misrepresentations, omissions and concealments.

- (a) Denied that it was represented that "the Capital Savings Plan is comparable to a savings bank account, but paying a higher rate of interest."
- (1) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 14, but denied that said sales bulletin was used in the sale of Capifol. 73] the Savings Plan Contract Certificates but was used only in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.
- (2) Denied that the word "savings" in the title of the contract certificates was misleading, and further averred that at all times the holders of the contract certificates were informed as to the facts, nature and character of the contract, and therefore denied that the complainants or other subscribers were misled.
- (3) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 18, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

- (b) Denied that it was represented that The Pennsylvania Company is "in back of" and sponsors the Capital Savings Plan and manages the investment of moneys paid in by purchasers.
- (1) Denied that this paragraph of the bill of complaint correctly sets forth an excerpt from a circular entitled "Capital Savings Plan, a Trusteed Savings Investment [fol. 74] Plan." On the contrary, it is averred that the correct excerpt from said circular is as follows: "Your Trustee. The collecting, investing and protecting of your money are entrusted not to Capital Savings Plan, Inc., but to your Trustee, The Pennsylvania Company for Insurances on Lives and Granting Annuities, Philadelphia." It is further averred that said circular clearly shows the investment of the payments after deductions in Independence Trust Shares.
- (2) Admitted that this paragraph of the bill of complaint sets forth an excerpt from Sales Bulletin No. 16, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.
- (4) Admitted that this paragraph of the bill in complaint sets forth an excerpt from Sales Bulletin No. 17, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.
- (c) Denied that it was represented that "money paid in by subscribers could be withdrawn in full at any time, or

[fol. 75] after definite periods variously represented to be one, two or three years."

- (1) Admitted that this paragraph of the bill of complaint contains an excerpt from page 22 of a prospectus issued by Capital Savings Plan under date of April, 1935. It is further averred that this maturity chart on its face is a denial of the averment which it is set forth to prove, which shows first year paid in \$120—value \$60.40.
- (d) Denied that it was represented that "for each \$1200 paid in the subscriber would receive \$2000 in cash at the end of a definite period variously stated to be from seven to fourteen years and usually stated to be ten years or less."
- (1) Admitted that this paragraph of the bill of complaint contains an excerpt from Sales Bulletin No. 16 but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.
- (e) Denied that it was represented "that the subscriber to a contract certificate is guaranteed against loss."
- (1) Admitted that this rangraph of the bill of complaint contains an excerpt from Sales Bulletin No. 17, but denied that said sales bulletin was used in the sale of Capital Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this ex-[fol. 76] cerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.
- (f) Denied that it was represented "that if the subscriber had begun a Capital Savings Plan at any time from

January 10, 1932, to June 10, 1934, he would have had a substantial profit as of February 3, 1937," without disclosing to purchasers that the value of the certificate was dependent upon the fluctuating market prices of the common stocks underlying the trust shares, and denied that at all times subsequent to January 14, 1938, all Capital Savings Plan Contract Certificates theretofore purchased showed substantial losses.

- (1) Denied that there is any misrepresentation contained in the maturity charts set forth in paragraph 35 (c) (1) of the bill of complaint and denied that said maturity chart has any fraudulent persuasive character.
- (g) Denied that it was represented "that the Contract Certificates with insurance provide that upon the death of the purchaser a lump sum, variously stated on unit certificates to be from \$1,200 to \$2,000 in cash, would be immediately payable to the named beneficiary." It is further averred that this paragraph c the bill of complaint is specifically denied by the averments of paragraph 24 of the bill of complaint itself.
- (h) Denied that it was represented "that a Contract Certificate is a medium of investment and a method for the installment of periodic purchase of trust shares under which the purchaser invests, and pays in, a definite sum of money over a definite period, and upon which the purchaser. [fol. 77] may receive income, profit and appreciation." without full disclosure to purchasers as to sponsor's fees, Trustee's fees, deductions for insurance premium and the charge on Independence Trust Shares. Denied that in the installment plan with insurance, there are additional deductions for premiums on the insurance of \$5141 for standard risks. On the contrary, it is averred that there are additional deductions for premiums on insurance for standard risks of \$51.41. Denied that the charge of 9 per cent which prior to May 2, 1938, was added to the price of the common. stocks underlying the Independence Trust Shares and the charge of 7½ per cent after May 2, 1938, was added to the price of the common stocks underlying the Independence Trust Shares was an arbitrary charge. On the contrary, it is averred that each of said charges represents the value of said services rendered by Independence Shares Corporation in purchasing underlying securities, depositing them with Trustee, and the creation and issuance of trust shares and

the cost of marketing the same. It is admitted that prior to May 2, 1938, of the 9 per cent charge, 11/2 per cent was retained by Independence Shares Corporation and 71/2 per cent was paid to Capital Savings Plan, Inc., but it is averred that as of May 2, 1938, the said charge was reduced to 71/2 per cent and from said date to December 31, 1938, was divided 11/2 per cent to Independence Shares Corporation and 6 per cent to Capital Savings Plan. Inc., and since January 1, 1939, all of said 71/2 per cent charge has been retained by Independence Shares Corporation. The averment that there is an additional charge in Independence Trust Shares of 21/2 per cent of currently distributable income and currently distributable principal deducted semi-annually and paid to the Trustee is denied for the reasons more fully set forth in the answer to paragraph 27 of the bill of complaint.

(1) Admitted that this paragraph of the bill of complaint contains an excerpt from Sales Bulletin No. 18, but denied that said sales bulletin was used in the sale of Capital [fol. 78] Savings Plan Contract Certificates but was only used in a course of instruction of sales representatives to develop salesmanship. It is further averred that this excerpt is on its face a denial of the averment it is set forth to prove, and it is further averred that the salesmen were at all times familiar with the contract certificate and were instructed to make full disclosures to all purchasers and prospective purchasers, and that at no time was said sales bulletin issued to the public.

(2) Admitted that this paragraph of the bill of complaint contains an excerpt from a circular entitled "Capital Savings Plan, a Trusteed Savings Investment Plan."

36. Denied that Independence Shares Corporation and Capital Savings Plan, Inc., were and are in violation of the Securities Act of 1933 by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails have obtained and now are obtaining money and property by means of any fraudulent, untrue statements, misrepresentations, omissions and concealments and other false pretenses. On the contrary, it is averred that no Capital Savings Plan Contract Certificates have been sold since April 9, 1938, that since May 1, 1934, no Capital Savings Plan Contract Certificates have ever been sold in interstate commerce or to other than

residents of the Commonwealth of Pennsylvania, and further, Capital Savings Plan, Inc., merged with and became Independence Shares Corporation on December 31, 1938. Further denied that Independence Shares Corporation or Capital Savings Plan, Inc., have committed any violation of the Securities Act of 1933, and have obtained no money or property by means of or have made any fraudulent, untrue statements, misrepresentations, omissions and concealments or other false pretenses.

- [fol. 79] VI. Proceedings by the Securities and Exchange Commission Against Capital Savings Plan, Inc., and Independence Shares Corporation for Violations of the Securities Act of 1933
 - 37. Admitted.
 - 38. Admitted.
- 39. Admitted. It is averred that after said decree the Securities and Exchange Commission on June 14, 1938, made effective a registration statement of Independence Shares Corporation relating to the issuance and sale of Independence Trust Shares, and that at all times referred to in the bill of complaint, Capital Savings Plan, Inc., was and Independence Shares Corporation was and now is doing business under licenses duly issued by the Pennsylvania Securities Commission.

VII. Liabilities of Defendant Investment Companies to Subscriber

- 40. Defendants are advised by counsel that this paragraph of the bill of complaint states a conclusion of law and therefore requires no denial, but it is denied that there were any fraudulent, untrue statements, misrepresentations, omissions and concealments and therefore that defendants are not liable to complainants or any other subscribers, under and by virtue of Sections 12 and 13 of the Securities Act of 1933.
- 41. Defendants are advised by counsel that paragraph 41 states a conclusion of law and therefore requires no denial, but it is denied that Independence Shares Corporation is a Trustee ex maleficio with respect to all or any contract certificates sold, and further denied that there is

any liability under either the Securities Act of 1933 or any other law or laws.

[fol. 80] 42. Denied that there is any liability to subscribers in the sum of \$5,000,000 or any other amount whatsoever.

- 43. Denied that the Independence Shares Corporation prospectus dated January 3, 1939, admits any liability, and it is further denied that there is any contingent liability whatsoever based on fraud, misrepresentations, omissions and concealments.
- 44. Denied that there is any liability with respect to Independence Trust Shares sold in the sum of \$3,486,000 or \$5,000,000, or any other sums whatsoever.
- 45. Denied. On the contrary, it is averred that the liquidation value of Independence Trust Shares is and has been at all times available to complainants and other subscribers, either through inquiry at the office of Independence Shares Corporation, at the office of the Trustee, or through regular daily published quotations of the price of Independence Trust Shares published in daily newspapers of general circulation in the City of Philadelphia and in many other daily newspapers published throughout the United States. It is further averaed that the fair valuations of the aggregate of the property and assets of Independence Shares Corporation and of the assets held by the Trustee, are fully set forth in the prospectus of January 3, 1939, referred to in paragraph 43 of the bill of complaint. Further denied that Independence Shares Corporation has any affiliates or subsidiaries.
- 46. Denied that Independence Shares Corporation has any affiliates or subsidiaries. Denied that Independent Shares Corporation is insolvent. On the contrary, it is averred that Independence Shares Corporation is solvent. Denied that the trust assets held by the Trustees are not sufficient to pay the liquidation value of all Independence Trust Shares. On the contrary, it is averred that the trust assets are sufficient to pay all holders of Capital Savings Plan [fol. 81] Contract Certificates in accordance with their respective rights. Denied that the trust assets held by the Trustee for the holders of Capital Savings Plan Contract Certificates and by the Trustee for the holders of Inde-

pendence Trust Shares are assets of Independence Shares Corporation, for the following reasons, respectively: The certificates are issued under the terms of a Trust Agreement dated as of May 1, 1934, between Capital Savings Plan, Inc., The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee (See Ex. P.30). and those persons (therein called investors) who become parties thereto by purchasing said contract certificates. The contract certificates provide for the payment to the Trustee of a certain sum in either ten annual, twenty semiannual, forty quarterly, or one hundred twenty monthly payments, and are issued either without insurance benefits or with insurance benefits, in which case insurance is carried under a reducing group life insurance policy covering the amount of the unpaid payments. The insurance lapses if the investor becomes in default for a period of sixty days.

All payments are required to be made by the investor directly to the Trustee and the investor authorizes the Trustee to make certain deductions therefrom and to apply the balance of the purchase of Independence Trust Shares in the manner and at the times set forth in the Trust Agreement. The Trust Agreement (see Section 1 of Article II) provides that the Trustee shall purchase the Independence Trust Shares within twenty days at the current market

price.

The deductions made from the payments are: (a) the company's service charge of \$60 per \$10 a month certificate, deducted from the first eight or nine monthly payments; (b) the Trustee's fee of 25 cents per \$10 payment or fraction thereof, deducted from each payment; and (c) in the case of contracts with insurance protection, the reducing insurance premium. The application signed by the investor authorizes the Trustee to purchase additional trust [fol. 82] shares, with the distributions upon his trust shares, at the current offering price.

The market or offering price of Independence Trust Shares is calculated by taking the market value of the stocks in the underlying portfolio of Independence Trust shares, plus brokerage and taxes, to which is then added a charge, originally 9 per cent, and since June of 1938 7½ per cent, and also the proper pro rata share of the distribution fund arising principally from the dividends paid on the stocks in the underlying portfolio. Prior to the merger of Capital Savings Plan, Inc., with Independence Shares

Corporation, this dealer's profit was divided between the two companies and since the merger, the entire profit accrues to Independence Shares Corporation. The profit is realized not only upon the purchases of trust shares with the investor's payments after deductions have been made. but also from the purchase of additional trust shares with the distributions directed to be reinvested. The Trustee pays for the trust shares against the delivery of trust share certificates and the trust share certificates are held by the Trustee in its vaults, registered in its name as Trustee under the Trust Agreement. The Trustee keeps separate records for each investor upon which it notes from time to time the number of trust shares held for the particular investor carried to the third decimal point. The investors are entitled to make either partial or complete withdrawals under their contract certificates, in which event the Trustee either sells their trust shares and remits the net proceeds to the investor, if so desired, transfers and delivers the trust shares themselves to the investor. When the Trustee sells the trust shares, it sold them prior to June of 1938 to Independence Shares Corporation or Capital at the bid prices quoted by Independence Shares Corporation. June of 1938, Independence Shares Corporation and Capital have been purchasing trust shares (except in several cases where large blocks of trust shares were offered for sale) at a "creation price," which price represents the cost of creating the trust shares, without the addition of [fol. 83] the 7½ per cent load. Prior to June 1938, the bid price was less than said "creation price," but not more than the price at which the trust shares could be liquidated by surrendering them to the Trustee under the Independefice Trust Shares Trust.

Capital, and since the merger, Independence Shares Corporation, have maintained with the Trustee an escrow fund of trust shares principally for the purpose of handling

fractional share transactions.

From the above it will be noted that neither Capital, nor Independence Shares Corporation, have any right, title or interest in and to the trust shares held by The Pennsylvania Company from time to time for the benefit of the holders of the contract certificates. Their rights were confined to (a) the service fees deductible from the first 8 or 9 periodic payments; (b) the profits accruing upon the sale of the trust shares to the Trustee from the charge, origi-

nally 9 per cent, now 7½ per cent; (c) any additional profits which might accrue from purchasing shares at a bid price less than the creation price (this additional profit is now largely eliminated); (d) their interest in the trust share escrow fund with the Trustee.

Independence Shares Corporation at the present time, therefore, has no right, title or interest in and to the Independence Trust Shares held by The Pennsylvania Company for the investors holding a Capital Savings Plan Contract Certificate, but it does have a potential income arising out of the contract certificates so long as it can continue to

deal in and create Independence Trust Shares.

Independence Trust Shares are the shares of a semi-fixed investment trust of the unit type. They are created under a trust agreement dated as of April 2, 1930, as amended, between Independence Shares Corporation, a Delaware corporation, as depositor, and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, Independence Shares Corporation, a Pennsylvania corporation, has become successor depositor to the

original Delaware corporation.

[fol. 84] Independence Trust Shares are created by the depositor by delivering to The Pennsylvania Company, as Trustee, one share of each of 35 companies (there were originally 50 companies, 15 of which have since been eliminated) now in the so-called portfolio, plus sufficient cash to equalize the distribution fund which arises from the dividends paid upon the underlying shares. Against each such deposit The Pennsylvania Company, as Trustee, delivers to the depositor 1000 Independence Trust Shares registered in its name. The shares of stock of the underlying companies are held by the Trustee in its vaults registered in its name as Trustee under the trust agreement. The Trustee collects the dividends payable upon the shares of stock in the portfolio, and, after making deductions for cost of administering the trust and taxes, makes a semi-annual distribution on April 1 and October 1, in each year, to the registered holders of the trust shares as of February 28, and August 31 in each year.

Any holder of 1000 trust shares may surrender them to the Trustee and upon payment of the transfer charges and taxes receive from the Trustee one share each of each of the underlying companies, and the proper proportion of

the distribution fund. The holder of less than 1000 trust shares may also surrender them to the Trustee upon three days' notice, in which event he is entitled to receive in cash instead of in kind an amount equivalent to the redemption *value, which is figured on the basis of the aggregate bid price of the stocks in the portfolio, less transfer taxes and charges, and plus the proper proportion of the distribution fund. The depositor has the right to purchase such trust shares within the first two days by paying such cash surrender value, and since the trust was organized the depositor has always exercised this right. However, in order to provide a fund for the redemption of less than one unit, should the depositor not exercise its said right, the depositor has lodged with the Trustee a revolving fund consisting of \$2500 in cash and 1000 trust shares to provide [fol. 85] such cash as might be necessary to meet the demands of withdrawing trust share holders.

Under Section III of Article Seven of the trust agreement, the depositor is entitled to charge against the income of the trust in excess of 1½ cents per trust share semi-annually to provide for the cost of administering the trust. The charge recently in effect was 2½ per cent of the distribution fund, all of which was paid over to the Trustee. Under a recent amendment effective on and after March 1, 1939, the administration fee is to be computed in accordance with the standard dates now fixed by the Trustee for transactions involved in the administration of the trust, but in no event is such fee to be in excess of 1 cent semi-annually for each trust share outstanding. All of this charge will be turned over to the Trustee for its services, and the depositor will receive no compensation, as such, from the trust and will pay such expenses as investment counsel and

auditing out of its own pocket.

As Independence Shares Corporation sells the trust shares it creates, they are transferred of record into the names of the purchasers and it will be, therefore, noted that Independence Shares Corporation has no right, title or interest in and to any trust share certificates or the underlying portfolio represented thereby which are held by owners other than Independence Shares Corporation. The interest of Independence Shares Corporation in the trust under which Independence Trust Shares are issued is therefore confined to: (a) such trust shares as it may from time to time create or purchase before they are sold (b) its in-

terest in the cash and trust shares held by the Trustee in the revolving fund, and (c) its interest in any distribution payable upon the trust shares in the revolving fund or such trust shares as it may own at the ex-dividend dates. It will be further noted that Independence Shares Corporation has no income from the administration of the trust, and that its income depends upon its ability to continue to create new trust shares and to deal in trust shares so that they may be sold at a profit.

[fol. 86] VIII. Necessity for the Appointment of a Receiver

- 47. Admitted that the publicity referred to in this paragraph of the bill of complaint, for which publicity the complainants have been largely responsible, is adverse and detrimental to the business and continued operation of Independence Shares Corporation. The remaining averments of this paragraph of the bill of complaint are denied. the contrary, it is averred that all holders of Capital Savings Plan Contract Certificates have had full knowledge of the method of operation of Independence Shares Corporation and the fees and charges involved in the purchase of contract certificates. Further denied that said fees and charges are excessive and further denied that the public generally believed that said contract certificates will not and cannot yield any profit to subscribers. Further denied that Independence Shares Corporation has any subsidiaries or affiliates.
- 48. Denied that the sale of Independence Trust Shares Purchase Plans have virtually ceased. On the contrary, it is averred that there is a substantial sale of Independence Trust Shares Purchase Plans and Independence Trust Shares. All other averments of this paragraph of the bill of complaint are denied. On the contrary, it is averred that in the event the relief prayed for by the complainants is granted, that the income of Independence Shares Corporation will cease, and that such relief would result in irreparable damage and loss to complainants and other subscribers.
- 49. Admitted that complainants Roland W. Randal, R. G. Cadman, James L. Gleason, Samuel Miller, Joseph Laky and Abe Zubrow, have demanded through their counsel an amount equal to the sums paid in by each of them, together with interest thereon, but denied that complain-

ants David W. Compton, Robert J. Deckert and Irene B. Randal have demanded such sums from Independence [fol. 87] Shares Corporation. Further denied that there is any limited cash surrender value.

50. Denied that Independence Shares Corporation is liable or has admitted any liability to complainants and other subscribers, but admitted that Independence Shares Corporation has refused to comply with the demand made by the attorney for complainants Roland W. Randal, R. G. Cadman, James L. Gleason, Samuel Miller, Joseph Laky and Abe Zubrow, but denied that complainants David W. Compton, Robert J. Deckert and Irene B. Randal have made any demand on Independence Shares Corporation.

51. Denied; except as to the present action instituted by your complainants that any other suits or actions at law and in equity have either been commenced or threatened by other holders of Capital Savings Plan Contract Certificates. Further denied that there is any limited cash surrender value.

52. Each and every allegation of this paragraph of the bill of complaint are denied. On the contrary, it is averred that except for the present action no other individual subscribers have brought or threatened actions, and further, that the assets of Independence Shares Corporation are sufficient to pay in full all of the actual liabilities of Independence Shares Corporation, and that Independence Shares Corporation is solvent.

53. Denied. On the contrary, it is averred that full and complete information regarding the details of the business and operation of Independence Corporation and Capital Savings Plan, Inc., were at all times available to your complainants. Further denied that Independence Shares Corporation has any subsidiaries or affiliates.

54. (a) Denied. On the contrary, it is averred that Independence Shares Corporation is solvent and able to meet its debts and liabilities.

[fcl. 88] (b) Denied. It is denied that either Independence Shares Corporation or Capital Savings Plan, Inc., have subsidiaries or affiliates. It is further averred that at all times proper accounts of the assets, transactions, affairs

and business of Independence Shares Corporation and Capital Savings Plan, Inc., have been kept and duly filed with the Pennsylvania Securities Commission and the Securities and Exchange Commission, said accounts having been prepared by independent certified public accountants not in any way dominated by the defendants.

- (c) Denied. It is denied that a multiplicity of suits have been threatened, and it is further denied that the appointment of a receiver will prevent a threatened and probable multiplicity of suits.
- (d) Denied. Denied that there has been any dissipation, depletion and waste of assets equitably belonging to complainants and other subscribers. Further denied that the appointment of a receiver will safeguard and preserve such assets. On the contrary, it is averred that Independence Shares Corporation has always protected, preserved and safeguarded such assets.
- (e) Denied that there have been any inequitable preferences. Further denied that the appointment of a receiver would result in the division of assets equitably among the persons entitled thereto without the necessity of litigation. On the contrary, it is averred that the appointment of a receiver would only result in further litigation, and would further deprive other subscribers who are desirous of making additional payments of their rights to do so as provided in said contract certificates.
- (f) Denied that Independence Shares Corporation is a Trustee ex maleficio, and denied that liquidation and distribution of the assets equitably belonging to complainants should be undertaken by an officer or representative of the Court only. On the contrary, it is averred that under the [fols. 89-90] terms of the Capital Savings Plan Contract Certificates and the Independence Trust Shares Purchase Plans, The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee and Custodian, respectively, is the only agency which can handle, liquidate or distribute the trust assets equitably belonging to the complainants and other subscribers.
- (g) Denied. On the contrary, it is averred that complainants have an adequate remedy at law.

Wherefore, the defendants pray that the bill of complaint be dismissed for the following reasons:

- 1. This Court has no jurisdiction.
- 2. The bill of complaint fails to set forth any cause of action.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

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Bnoependence Erust Bhares Purchase Plan Monthly Papment Plan

Nº B

This Agreeintt, made by and between INDEPENDENCE SHARES TION, a corporation duly organized and existing under the laws of the Commonwealt vania, (hereinafter called "Company"), and

Witnesseth:

Hitters, Purchaser has made application which the Company has act to Purchaser of a Plan in this form, and desires to become a party hereto PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND (TIES, (hereinafter called the "Custodian"), as Custodian hereunder for P

NOW, THEREFORE, trained, and the payment ner as follows:

the aggregate of \$... Section 1. Purchs

the first of such ps

withdrawal, return of partial withdraw, c of \$1.00 from the proceeds of Trust

939, and subject to further change without notice, this deduction will be a rates now fixed by the Trunsection involved in the adminisments, but in no event shall the fee be in access of the amoust of one cent outstanding on February 28 and August 31 of each year.

Distributions on Trust Shares and the Application Thereof 5

Rights of the Purchaser

tt collects such distributions to the purchase of additional Trust Shares from the date upon which terms of this Plan. Any distributions in the form of additional Trust Shares shall be added to those held for the Purchaser by the Custodian and any distributions in form other than cash or Trust Shares shall be sold by the Custodian at such prices as it may be able to realize therefor and the net proceeds applied to the purchase of additional Trust Shares.

- multiple of Payments: The Purcha his regular periodic payments.
- B. Remittance of Cash Distributions:—The Purchaser may from time to time instruct the Custodian to remit the cash distributions upon his Trust Shares and, having so instructed the Custodian, may subsequently direct that cash be reapplied to the purchase of additional Trust Shares
- or direct the Custodian in writing to sell part of his Trust Shares and remit the net proceeds. In any such case the Purchaser shall first deliver this Plan to the Custodian for proper notation thereon. If the Purchaser shall have withdrawn Trust Shares, he shall have the right at any time prior to exercising Right D, upon delivery hereof to the Custodian and the payment to it of a charge of \$1.00, to redeliver to it the Shares withdrawn to be held for him hereunder. Partial Withdrawal:-The Purchaser may at any time withdraw part of his Trust Sh
- D. Complete Withdrawal:—The Purchaser may at any time terminate this Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to or upon his order or to sell his Trust Shares and remit the net proceeds to or upon his order. If the Purchaser instructs the delivery of his Trust Shares, sufficient Trust Shares will be sold to pay all authorized deductions and leave no fractional Trust Shares and the net balance will be paid in cash.
- E. Additional Payments:—After the Purchaser has completed his agreed payments, he may notify the Custodian in writing that he desires to make 60, additional monthly payments (or periodical equivalent), whereupon he may make such payments or, if he so desire, discontinue making such payments without becoming delinquent. Upon the exercise of this Right E and while Purchaser is making such additional payments, the deductions therefrom for the Custodian's service fee will be the same at the deductions for those fees from the first 60 payments but without any deductions for Company's creation fee:
- F. Continuation of Custodianship:—After the Purchaser has completed his payments he may permit the Custodian to retain custody of his Trust Shares, either applying distributions to the purchase of additional Trust Shares or remitting the same if Right B is exercised. Right C may there after be exercised from time to time and whenever the Purchaser desires to terminate he may do so by exercising Right D.
- G. Increase of Amount of Monthly Payment:—At any time prior to the completion of his 120 monthly payments the Purchaser may, subject to the consent of the Company and Custodian, exchange this Plan for a Plan providing for the payment of larger monthly payments in multiples of \$10.00 without the imposition of an additional \$60.00 creation fee, but without adjustment for any other fees or charges already imposed. The new Plan will be dated as of an appropriate date taking into consideration the payments already made and the Purchaser will be credited upon his new Plan with the payments already made upon this Plan.

Valuation of Trust Shares

- A. Whenever under the terms of this Plan Independence Trust Shares are to be purchased, the Company agrees to sell said Independence Trust Shares to the Purchaser and deliver the same to the Custodian at a purchase price to be determined as follows: The purchase price of one Independence Trust Share shall be determined by adding together the price of each of the stocks then constituting a Deposit Unit underlying said Trust Shares, plus the price of each of the stocks then constituting account and dividends declared but not yet received applicable to one unit (excepting cash previously set aside for semi-annual distributions and sums reserved for taxes and other purposes), the price of stock dividends, rights and other like distributions received or receivable and not yet sold, plus all customary odd lot brokerage and commissions, taxes and stock exchange service charges, if any, and dividing the sum so obtained by 1000. The price of listed stock; stock dividends, rights and the like shall be determined by the last sale price at the close of the business day last preceding the day during which the Custodian orders the Trust Shares from the Company as shown by any published quotations in common use among bankers and brokers, and, if there be no record of any sale on that day, then the last sale price at the close of the business day last preceding the day on which a sale is so published. The "bid" and "ask" price at the close of the business day last preceding the day on which the Custodian orders the Trust Shares from the Company as quoted to the Company by any reputable broker or dealer dealing in such stocks, plus commissions, if any.
 - B. Whenever under the terms of this Plan Independence Trust Shares are to be sold by the Custodian, they shall be sold at a price to be determined in the same manner as the "purchase price" is determined, except that all customary odd lot brokerage, commissions, taxes and stock exchange service charges, if any, shall be deducted, instead of added, in determining the value of one Trust Share. The Company agrees to purchase fractional Trust Shares at such "sale price." If the Qustodian is unable to sell any Trust Shares at said sale price, Custodian is authorized to sell or to convert the Trust Shares at the redemption price specified in the Agreement and Declaration of Trust under which Independence Trust Shares are issued. The Company agrees that, to the extent it has

Shares, it will purchase all Trust Shares from the Custodian at the orders for the purchase of Trust current "purchase price." G. In the event of substitution of Trust Shares pursuant to Section 8, the purchase price and sale price shall be fixed upon a similar basis, that is, the purchase price and sale price shall differ only as to the addition or subtraction of odd lot brokerage, commissions, taxes and stock exchange service charges, if any. The purchase price shall not include selling commissions to the Sponsor, Distributor or Company. D. In the event of the suspension of the business of the New York Stock Exchange (which term shall mean the New York Stock Exchange as now constituted, or any other exchange supplianting it as the principal stock exchange in the United States), the Custodian may purchase or sell Trust Shares, and in any such case Custodian is authorized to conclusively rely upon the Company's quotation of the value, whether on purchase or sale of Trust Shares, or may in its discretion defer purchases and/or sales for such period of time as may in its discretion be necessary.

E. Custodian is at all times authorized to rely upon the purchase price and sale price quoted to it by the Company, or in case of substitution, by the Issuer or Sponsor of the substituted Trust Shares.

Section 7. So long as the Purchaser continues to make his payments promptly when due neither or the Company nor the Custodian may terminate this Plan for twenty years from the date of its issuance, except as hereinafter provided in Section 8. In the event that the Purchaser shall fail to make any payment for a period of one year after the same becomes due, he shall be considered delinquent and thereupon either the Company or the Custodian may terminate this Plan by giving writter notice thereof to the Purchaser and the Purchaser shall be required to surrender this Plan to the Custodian. In case this Plan is so terminated, the Custodian may in its discretion (a) either sell the Purchaser's Trust Shares or (b) sell sufficient Trust Shares into the name of the Purchaser. Upon surrender of this Plan to the Custodian, it will pay to or upon the order of the Purchaser. Upon surrender of this Plan to the Custodian it will pay to or upon the order of the Purchaser the net proceeds of his Trust Shares noted upon its records either its check for the net proceeds of sale or his Trust Shares or his full Trust Shares with check for cash balance, in either of which events the Purchaser shall have no further rights hearth chase. Termination by the Company or Custodian

At the expiration of twenty years from the date hereof, either the Custodian or the Company may (but shall not be required so to do) give the Purchaser notice that he is required to exercise right D as set forth in Section 5 within thirty days of such notice and in default of the exercise of either of said rights within said thirty day period, either the Company or the Custodian may terminate this Plan and the Custodian will then proceed as above provided in the case of delinquency

Section 8. If at any time the Trust Shares are not available for purchase, or if the Company deems it to the best interest of Purchaset, the Company may substitute (either as to Trust Shares already purchased and to be purchased, or only as to Trust Shares to be purchased), the shares of an investment trust or of an investment company generally comparable to the Trust Shares then purchasable hereunder; provided, however, that before any such substitution may be made, Company shall

(1) Give at least thirty days' notice to Purchaser of the proposed substitution reasonably describing the new Trust Shares and advising the Purchaser that if Purchaser does not approve of such substitution, Purchaser must within thirty days after the date of such notice notify the Custodian in writing that he desires to completely withdraw.

 Setisfy Custodian that the current purchase price and current sale price for the substituted Shares can be reasonably established. Trust

(3) In the case of substitution of new Trust Shares for Trust Shares already purchased, Company shall furnish new Trust Shares having an aggregate current purchase price value less all dealer's commissions, at least equal to the grangate current sale price value of Purchaser's old Trust Shares.

Upon being furnished with a certificate signed by the President or Tressurer of the Company that the Company has complied with the foregoing condition, unless the Custodian within thirty days from the date of the notice of the Company to the Purchaser shall have received from Purchaser a written notice that Purchaser desires to completely withdraw, the Custodian is authorized theneforth to purchase the substituted Trust Shares and, if old Trust Shares are to be exchanged, to exchange the old Trust Shares for the substituted Trust Shares. The Custodian is hereby authorized to conclusively rely upon the above registioned certificate of the Company. The right of substitution herein given to the Company may be exercised by it from time to time and as often as it deems necessary. In the event that the substituted Trust Shares have voting rights, the Custodian is authorized to give proxies to the Company or its nominee or nominees.

In the event that the Trust Shares shall not be purchasable for a period of ninety days and the Company fails to make substitution as above provided, the Custodian may, if it finds another medium of investment which it, in its sole discretion, feels it should submit, select the shares of another investment trust company generally comparable to the Trust Shares, in which event Custodian will give written notice to Purchaser of Custodian's willingness to purchase such other Trust Shares, and if, within thirty days from the date of such notice, Purchaser shall give written approval to the Custodian, Custodian will thereafter purchase such other Trust Shares. If the Purchaser fails

Substitution of Trust Shares

within said period of thirty days to give said written approval, the Custodian may conclusively treat such failure as evidence that Purchaser has terminated this Plan, whereupon the Custodian may proceed to the termination of this Plan as in the case of delinquency.

In case the Trust Shares shall not be purchasable for a period of ninety days, and neither the Company nor the Custodian substitutes other Trust Shares as hereinbefore provided, it is agreed that this Plan shall immediately terminate, and in such event Custodian is authorized to proceed to liquidation as in the case of delinquency.

sable; provided, however, that Pu Section 9. This Plan shall be neither negotiable nor chaser may either A. Upon the payment of a charge of \$1.00 to the Custodian transfer his right, title and interest in and to his Trust Shares to another person acceptable to the Company and the Custodian, which person has made application with respect to such transfer for the delivery to him of a Plan similar

B. Transfer his right, title and interest in and to his Trust Shares without any charge to another person, whose only right shall be to exercise the right of complete withdrawal pursuant to the provisions of Section 5.

C. Execute and file with the Custodian a Declaration of Trust in form satisfactory to the Company and the Custodian declaring that Purchaser holds his right, title and interest in and to his Trust Shares for the benefit of another person or persons as therein provided.

Except as herein provided, no such transfer shall be binding upon the Company or the Custodian, and urtil the Custodian and the Company shall have received written notice of any such permitted transfer, the Custodian and the Company may treat the Purchaser as the sole and only person having any interest under the terms of this Plan or in the Trust Shares.

Section 10. The Custodian shall not be personally liable for any taxes levied or assessed against it with respect to the Trust Shares in its custody hereunder or arising from the income thereof or sale or transfer thereof. The Custodian is authorized to incur any expenses (which term shall include auditing expense and counsel fees) deemed by it necessary or proper in connection with any claim or pussible daim for taxes. The term "tax liability" as used in this Plan shall include not only all taxes and possible taxes, with the exception of issuance taxes, but also all such expenses which have been incurred or are likely to be incurred in connection therewith. The Custodian may in its discretion from time to time make deductions to pay or set up reserves for tax liability and may, if deemed necessary, sell Trust Shares to provide funds for the payment of tax liability or for reserves therefor, but upon final adjustment of such tax liability, the Custodian shall make the proper adjustment of any reserve with the Purchaser. The Company agrees to pay all original issuance taxes, if any, imposed in connection with this Plan.

Section 11.

A. The Custodian is authorized to commingle the Purchaser's payments and distributions with payments and distributions received from others and deposit the same in a general deposit account or accounts, in its own banking department or in other banks or trust companies, in its name as Custodian for individual Purchasers under Independence Trust Share Purchase Plans. The Custodian is likewise authorized to commingle any or all Trust Shares purchased for the Purchaser with Trust Shares purchased for others; provided, however, that Custodian shall not commingle any certificates representing Trust Shares with its own corporate assets.

B. The Custodian is authorized to cause all certificates representing Trust Shares to be registered in its name as Custodian or in the name of its nominees.

C. Custodian shall keep accounts for the Purchaser showing all payments made hereunder, the deductions therefrom, and the proper amount of Trast Shares or fractions thereof held for Purchaser from time to time. The Company and Purchaser shall have the right to inspect said accounts during usual business hours.

D. The Custodian assumes no duties or obligations not specifically imposed upon it by this Plan. Without limiting the generality of the foregoing, the Custodian assumes no responsibility for the choice of the investment policies of the Trust under which the Trust Shares are issued, or for any act or omissions on the part of the Company. The Custodian specifically does not assume the duties of investment ordinarily imposed upon a trustee and its only obligation shall be to administer its custodianship duties as in this Plan specifically set forth. The Custodian assumes no responsibility for the compliance by the Company with any federal or state law relating to the issuance, registration or qualifications of securities, or for the compliance by the Company with any of the rules, regulations or orders of any commission or commissions constituted under any such law. All recitals contained herein shall be construed as those of the Company and not those of the Custodian.

E. The Custodian shall have no right to terminate its custodianship under this Plan until the same is terminated in accordance with the provisions hereof; provided, however, that any company into which the Custodian may be merged or with which it may be consolidated, or any company resulting from any reorganization, merger or consolidation to which Custodian shall be a party, or any company to which the Trust Shares shall be transferred pursuant to an order of any court or by mutual agreement of all of the parties hereto, shall be the successor of the Custodian hereunder and shall be bound by all of the terms hereof without the execution or filing of any paper or any further act on the part of any of the parties hereto.

Terms and Conditions of Custodianship

Notice

Section 12. Any notice required to be sent to the Purchaser shall be sufficiently delivered if placed in the United States mail with sufficient postage attached and addressed to the Purchaser at his address as the same is noted upon the records of Custodian. The date of mailing of such

notice shall be deemed to be the date of the giving of such notice.

Section 13. This Plan shall not be valid or binding for any purpose, nor entitle Purchaser to any rights or benefits unless and until the certificate hereon endorsed shall have been executed by the Custodian through one of its Authorized Officers.

reas of this Plan or to intained herein. A. No agent or other person has the authority to alter or change the tersbind the Company or the Custodian by any statement written of of all not cent Section 14.

but by a Certified Public Account-B. Custodian's accounts and records will be audited each ant duly licensed by the Commonwealth of Pennsylvania applied

- inchaser's Trust Shares. will furnish Purchaser with statements regarding the amount and nature of dividends and ending December 31st received by Custodian upon
- shall be construed according to, and all rights hereunder shall the construed according to, and all rights hereunder shall the construed according to the co D. The provisions of this Plan be governed by, the laws of the Con
 - has Plan to the masculine gender shall include the feminine and neuter Any ref gender.

become a party to this Agreement by accepting delivery hereof.

In Bilines's Whereof, the Company has caused this Agreement to be duly executed by the factinate of on the President this.

Independence Shares Corporation By The undersigned hereby agrees to act as Custodian for the Purchaser upon the terms and conditions set forth in this Agreement.

Che Pennsplbania Company for Insurances on Libes and Granting Annuities

Authorized Signer

Shares Burchage Full Paid Plan Trust : Independence

Non-negotiable Nº BB-

TION, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, (hereinafter called "Company"), and

Witnesseth:

Hitters, Purchaser has made application, which the Company has accepted, for the delivery to Purchaser of a Plan in this form, and desires to become a party hereto and to appoint THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING, ANNUITIES, (hereinafter called the "Custodian"), as Custodian hereunder for Purchaser,

NOW, THEREFORE, in consideration of the premises and of the mutual contained, and the payments to be made by Purchaser, the parties hereto more other, as follows:

Purchaser Section 1.

agrees to pay the Custodian

wledged.

Section 2.

% of the payur

ductions

-An amount A. From the payment:—An an to the Company for its creation fee

The Custodian is authorized and der

Purchaler's Trust Shares: From each distribution th

(1) To the Company (% of all cash distributions applied to the purchase of additional Trust Shares. This deducator will not be sindle from cash distributions directed to be remitted.

(2) To the custodian for its services 2/10 of 1% per annum, pc. ble semi-annually, df. the total payment make by the Purchaser. This deduction will be made from cash distributions whether remitted or applied to the purchase of additional Trust Shares.

There will also be deducted semi-annually out of the funds for distribution to holders of Independence That Shares prior to receipt of distributions by the Custodian 25% of said funds for distribution, which will be paid to the Trustee of Independence Trust Shares as its compensation for administering the Trust. (See note below.)

C. In case of each transfer and of each partial withdrawal, return of partial withdrawal, complete withdrawal or termination, a Custodian charge of \$1.00 from the proceeds of Trust Shares unless such amount be furnished to the Custodian.

D. The Purchacer also authorizes the Custodian to ceduct from his payment or distributions, or from the proceeds of sale of Trust Shares, whichever is more convenient, any sum or sums it may be required or permitted to pay or reserve for "tax liability" as defined in Section 16.

Section 3. Purchaser authorizes and directs Custodian to apply the balance remaining in the hands of Custodian from the payment, after making the deductions hereinbefore in Section 2 set forth, within two business glays from the date on whigh it collects said payments, to the purchase of Independence Trust Shares, being the shares of an investment trust of the fixed type, which Trust Shares and such other Trust Shares or Shares as may be substituted as hereinafter set forth in Section 8 are all hereinafter called "Trust Shares." The Company agrees to sell or cause the Trust Shares and necessary fractions thereof to be sold to the Purchaser and delivered to the Custodian at the price hereinafter set forth.

Section 4. Purchaser authorizes and directs the Custodian to collect all cash distributions made upon his Trust Shares, and unless Purchaser otherwise directs in writing to apply such distributions, after making authorized deductions, within two business days from the date upon which it collects such distributions to the purchase of additional Trust Shares for his account under the terms of this Plan. Any distributions in the form of additional Trust Shares shall be added to those held for the Purchaser by the Custodian and any, distributions in form other than cash or Trust Shares shall be sold by the Custodian at such prices as it may be able to realize therefor and the net proceeds applied to the purchase of additional Trust Shares.

Collection of Distributions on Trust Shares and the Application

Rights of the Purchaser

A. Remittance of Cash Distributions:—The Purchaser may from time to time instruct the Custodian to remit the cash distributions upon his Trust Shares and, having so instructed the Custodian, may subsequently direct that cash be reapplied to the purchase of additional Trust Shares.

Note —Effective on and after March 1, 1939, and subject to further change without notice, this deduction will be a sum computed in accordance with the standard rates now fixed by the Trustee for transactions involved in the administration of the Trust during the preceding six months, but in no event shall the fee be in excess of t.e amount of one cent semi-annually for each Trust Share issued and outstanding on February 28 and August 31 of each year.

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- B. Partial Withdrawal.—The Purclasser may at any time withdraw part of his Trust Shapes or such case the Custodian in writing to sell part of his Trust Shares and remit the net proceeds. In any such case the Purchaser shall first deliver this Plan to the Custodian for proper notation thereon. If the Purchaser shall have withdrawn Trust Shares, he shall have the right at any time prior to exercising Right C upon delivery hereof to the Custodian and the payment to it of a charge of \$1.00 to redeliver to it the Shares withdrawn to be held for him hereunder.
 - C. Complete Withdrawal:—The Purchaser may at any time terminate this Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to or upon his order or to sell his Trust Shares and remit the net proceeds to or upon his order. If the Purchaser instructs the delivery of his Trust Shares, sufficient Trust Shares will be sold to pay all authorized deductions and leave no fractional Trust Snares and the net balance will be paid in cash
- D Continuation of Custodianship.—To permit the Custodian to retain custody of his Trust Shares, pending partial or complete withdrawal, at his option, until this Plan is terminated at the option of the Custodian or the Company after twenty years from the date hereof.

Valuation of Trust Shares

- Section 6.

 A. Whenever under the terms of this Plan Independence Trust Shares are to be purch. 4, the Company agrees to sell said Independence Trust Shares to the Purchaser and deliver the same to the Custodian at a purchase price to be determined as follows: The purchase price of one Independence Trust Shares shall be determined by adding together the price of each of the stocks then constituting a Deposit Unit underlying said Trust Shares, plus the pro rate share of cash in the Distribution account and dividends declared but not yet received applicable to one unit (excepting cash previously set aside for semi-smunal distributions and sums reserved for taxes and other purposes), the price of stock dividends, rights and other like distributions received for receivable and not yet sold, plus all customary odd lot brokenge and commissions, taxes and stock exchange service charges, if any, and dividing the sum so obtained by 1000. The price of listed stocks, stock dividends, rights, and the like, shall be determined by the last sale price at the close of the business day last preceding the day during which the Custodjan orders the Trust Shares from the Company as shown by any published quotations in common use among bankers and brokers, and, if there be no record of any sale on that day, then the last sale price on the last preceding business day on which a sale is so published. The price of unlisted stocks, stock dividends, rights, and the like, is to be determined by the average between the "bid" and "ask" price at the close of the business day last preceding the day on which the Custodian orders the Trust Shares from the Company as quoted to the Company by any reputable broker or dealer dealing in such stocks, plus commissions, if any.
 - B. Whenever under the terms of this Plan Independence Trust Shares are to be sold by the Custodian, they shall be sold at a price to be determined in the same manner as the "purchase price" is determined, except that all customary odd lot brokerage, commissions, taxes and stock exchange. service charges, if any, shall be deducted, instead of added, in determining the value of one Trust Share. The Company agrees to purchase fractional Trust Shares at such "sale price." If the Custodian is unable to sell any Trust Shares at said sale price, Custodian is authorized to sell or to convert Trust Shares at the redemption price specified in the Agreement and Declaration of Trust under which Independence Trust Shares are issued. The Company agrees that, to the extent it has orders for the purchase of Trust Shares, it will purchase all Trust Shares from the Custodian at the current "Purchase Price."
 - C. In the event of substitution of Trust Shares pursuant to Section 8, the purchase price and sale price shall be fixed upon a similar basis, that is, the purchase price and sale price shall differ only as to the addition or subtraction of odd lot brokerage, commissions, taxes and stock exchange service charges, if any. The purchase price shall not include selling commissions to the Sponsor, Distributor or Company.
- b. In the event of the suspension of the business of the New York Stock Exchange (which term shall mean the New York Stock Exchange as now constituted, or any other exchange supplanting it as the principal stock exchange in the United States), the Custodian may purchase or sell Trust Shares, and in any such case Custodian is authorized to conclusively rely upon the Company's quotetion of the value, whether on purchase or sale of Trust Shares, or may in its discretion defer purchases and/or sales for such period of time as may in its discretion be necessary.
- E. Custodian is at all times authorized to rely upon the purchase price and sale price quoted to it by the Company or, in case of substitution, by the Issuer or Sponsor of the substituted Trust

Section 7. Neither the Company nor the Custodian may terminate this Plan for twenty years from the date of its issuance, except as hereinafter provided in Section 8.

At the expiration of twenty years from the date hereof, either the Custodian or the Company may (but shall not be required so to do) give the Purchaser notice that he is required to completely withdraw within thirty days of such notice and in default of the exercise of either of said rights within said thirty days' period, either the Company or the Custodian may terminate this Plan. In case this Plan is so terminated, the Custodian may in its discretion (a) either sell, the Purchaser's Trust Shares or (b) sell sufficient Trust Shares to pay all authorized deductions and leave no fractional Trust Shares and transfer the full Trust Shares into the name of the Purchaser. Upon surrender of this Plan to the Custodian, it will pay to or upon the order of the Purchaser the net proceeds of his Trust Shares, if sold, less authorized deductions, or deliver to him his full Trust Shares and balance of cash. No interest will be payable by the Custodian upon any funds held by it for the Purchaser pending the surrender of this Plan and the Custodian may in its discretion, if the Purchaser delays

Termination by the Company or Custodian

Substitution of

t Shares, or his full Trust Shares r shall have no further rights her

Section 8. If at any time the Trust Shares are not available for purchase, or if the Company is it to the best interest of Purchaser, the Company may substitute (either as to Trust Share ady purchased, and to be purchased, or only as to Trust Shares to be purchased), the shares of a stment trust or of an investment company generally comparable to the Trust Shares then purable hereunder; provided, however, that before any such substitution may be made, Com

- (1) Give at least thirty days' notice to Purchaser of the proposed substitution reasonably describing the new Trust Shares and advising the Purchaser that if Purchaser does not approve o such substitution, Purchaser must within thirty days after the date of such notice notify the Custodian in writing that he desires to completely withdraw,
 - (2) Satisfy Custodian that the current purchase and current sale price for the substituted Trust Shares can be reasonably established.
- (3) In the case of substitution of new Trust Shares for Trust Shares already purchased, Company shall furnish new Trust Shares having an aggregate current purchase price value less all dealer commissions, at least equal to the aggregate current sale price value of Purchaser's old Trust Share

Upon being furnished with a certificate signed by the President or Treasurer of the Company that the Company that the Company that the Company has compiled with the foregoing conditions, unless the Custodian within third days from the date of the notice of the Company to the Purchaser shall have received from Purchase a written notice that Purchaser desires to completely withdraw, the Custodian is authorized thence forth to purchase the substituted Trust Shares and, if old Trust Shares are to be exchanged; the exchange the old Trust Shares for the substituted Trust Shares. The Custodian is hereby authorized to conclusively rely upon the above mentioned certificate of the Company. The right of substitution herein given to the Company may be exercised by it from time to time and as often as it deem necessary. In the event that the substituted Trust Shares have voting rights, the Custodian is authörized to give proxies to the Company or its nominees or nominee.

In the event that the Trust Shares shall not be purchased for a period of ninety days and the Company fails to, make substitution as above provided, the Custodian may, if it finds another medium of investment which it, in its sole discretion, feels it should submit, select the shares another investment trust or investment company generally comparable to the Trust Shares, is which event Custodian will give written notice to Purchaser of Custodian's willingness to purchase such other Trust Shares, and if, within thirty days from the date of such notice, Purchaser sha give written approval to the Custodian, Custodian will thereafter purchase such other Trust Shares If the Purchaser fails within said period of thirty days to give said written approval, the Custodia may proceed to the termination of this Plan as in the case of delinquency.

In cese the Trust Shares shall not be purchasable for a period of ninety days, and neither the Company nor the Custodian substitutes other Trust Shares as hereinbefore provided, it is agree that this Plan shall immediately terminate, and in such event Custodian is authorized to proce to liquidation as in the case of termination.

Section 9. This Plan shall be neither negotiable nor Purchaser may either

- A. Upon the payment of a charge of \$1.00 to the Custodian, transfer his right, title and interest in and to his Trust Shares to another person acceptable to the Company and the Custodian, which person has made application with respect to such transfer for the delivery to him of a Plan similar
- B. Transfer his right, title and interest in and to his Trust Shares, without any charge, to another person whose only right shall be to exercise the right of complete withdrawal pursuant to the provisions of Section 5.
- . Execute and file with the Cystodian a Declaration of Trust in form any and the Custodian declaring that Burchaser holds his right, title and ir Shares for the benefit of another person or persons as therein provided.

Except as herein provided, no such transfer shall be binding upon the Company or the Custodian, until the Custodian and the Company shall have received written notice of any such permitted sfer, the Custodian and the Company may treat the Purchaser as the sole and only person having interest under the terms of this Plan or in the Trust Shares. uransfer, the

it with respect to the Trust Shares in its custody hereunder or arising from the income thereof or sale or transfer thereof. The Custodian is authorized to incur any expense (which term shall include auditing expense and counsel fees) deemed by it necessary or proper in connection with any claim or possible claim for taxes. The term "tax liability" as used in this Plan shall include not only all taxes and possible taxes, with the exception of issuance taxes, but, also all such expenses which have been incurred or are likely to be incurred in connection therewith. The Custodian may in its discretion from time to time make deductions to pay or set up reserves for tax liability and may, if deemed necessary, sell Trust Shares to provide funds for the payment of tax liability or for reserves therefor, but upon final adjustment of such tax liability, the Custodian shall make the proper adjustment of any reserve with the Furchaser. The Company agrees to pay all original issuance taxes, if

Section 14.

A. The Custodian is authorised to commingle the Purchaser's payment and distributions we payments and distributions received from others, and to deposit the same in a general deposit accounts, in its own banking department or in other banks or trust companies, in its name Custodian for individual Purchasers under Independence Trust Share Purchase Plans. The Ctodian is likewise authorized to commingle any or all Trust Shares purchased for the Purchaser w Trust Shares purchased for others; provided, however, that Custodian shall not commingle a certificates representing Trust Shares with its own corporate assets.

B. The Chaptodian is authorized to cause all certificates representing Trust Shares to be registered in its name as Custodian, or in the name of its nominees or nominees.

C. Custodian shall keep accounts for the Purchaser showing the payment made hereunder, the deductions therefrom, and the proper amount of Trust Shares or fractions thereof held for Purchaser from time to time. The Company and Purchaser shall have the right to inspect said accounts during usual business hours.

D. The Custodian assumes no duties or obligations not specifically imposed upon it by this the choice of the investment, the investment policies of the Trust under which the Trust Shares are issued, or for any act or omission on the part of the Company. The Custodian specifically does not assume the duties of investment ordinarily imposed upon a Trustee and its only obligation shall be to administer its custodianship duties as in this Plan specifically act forth, The Custodian assumes no responsibility for the compliance by the Company with any federal or state law relating to the issuance, registration or qualifications of securities, or for the compliance by the Company with any of the rules, regulations or orders of any commission on commissions constituted under any such law. All recituls contained herein shall be construed as those of the Company and not those of the

E. The Custodian shall have no right to terminate its custodiaten under this plan until the same is terminated in accordance with the provisions hereof; provided, however, that any company into which the Custodian may be merged, or with which it may be consolidated, or any company resulting from any reorganization, merger or consolidation which clustodian shall be a party, or any company to which the Trust Shares shall be candened pursuant to an order of any court or by mutual agreement of all of the parties hereof, shall be accessor of the Custodian hereunder and shall be bound by all of the terms hereof without the acceution or filing of any paper or any further act on the part of any of the parties hereof.

Section 12. Any notice profitted to be plut to the Purchaser shall be sufficiently delivered if placed in the United State parall with unfactor postage attached and addressed to the Purchaser at his address as the same is noted upon the records of Custodian. The date of mailing of such notice.

Section 13. The Plan shall not be valid or binding for any purchase.

Section 13 (That Flan shall not be valid or binding for any purpose, nor entitle Purchaser to any right of benefits unless and until the certificate hereon endorsed shall have been executed by the confeding through one of its Authorized Officers.

Section A. No agent or other person has the authority to alter or change the terms of this Plan or to bind the Company or the Custodian by any statement written or oral not contained herein.

B. Custodian's account and records will be audited each month by a Certified Public Accountant duly licensed by the Commonwealth of Pennsylvania, satisfactory to Custodian.

C. Company, upon the written request of Purchaser, will furnish Purchaser with statements regarding the amount and nature of dividends and distributions for each twelve months' period ending December 31st received by Custodian upon Purchaser's Trust Shares.

D. The provisions of this Plan shall be construed according to, and all rights hereunder shall be governed by, the laws of the Commonwealth of Pennsylvania.

Any reference in this Plan to the masculine gender shall include the feminin

Purchaser shall become a party to this Agreement by accepting delivery hereof

Independence Shares Corporation In Witness Whereof, the Company has caused this Agree facsimile signature of its President this

The Pennsplbanks Company for Insurances on Albes and Granting Annuities

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[fol. 111] IN UNITED STATES DISTRICT COURT

MOTION FOR DISMISSAL-Filed March 23, 1939

The Pennsylvania Company for Insurances on Lives and Granting Annuities, one of the defendants, moves the Court as follows:

- 1. To dismiss the action as to it because the complaint fails to state a claim against it upon which relief can be granted.
- 2. To dismiss the action against it on the ground that the complaint fails to state any grounds upon which the trust assets in its hands should be delivered into the possession of a receiver for Independence Shares Corporation (a Pennsylvania corporation).
- 3. To dismiss the action against it on the ground that the Court lacks jurisdiction because the amount actually in controversy as between citizens of different states is less than three thousand dollars exclusive of interest and costs.

Saul, Ewing, Remick & Saul. By Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 112] IN UNITED STATES DISTRICT COURT

MOTION FOR DISMISSAL—Filed March 23, 1939

The defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner; Horace M. Barba and Eckley B. Coxe, 3rd, move the Court as follows:

- 1. To dismiss the action because the complaint fails to state a claim against the defendants above named upon which relief can be granted.
- 2. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars, exclusive of interests and costs.
- 3. To dismiss the action on the ground that the Court lacks jurisdiction for the relief asked, since it appears from



the complaint that none of the complainants is a proper party to ask for the relief herein prayed for.

4. To dismiss the action as to Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal and Joseph Laky on the ground that the Court lacks jurisdiction because there is no diversity of citizenship between the named complainants and the above-named defendants.

(Sgd.) Robert F. Irwin, Jr. (Sgd.) Frank Rogers Donahue, Attorneys for Named Defendants.

[fol. 113] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Present:

Harry Shapiro, Esq., representing the plaintiffs.

Robert F. Irwin, Jr., representing Independence Shares Corporation of Pennsylvania, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3rd, defendants.

Saul, Ewing, Remick & Saul, Esqs., by Francis H. Bohlen, Jr., Esq., representing the Pennsylvania Company for Insurances on Lives and Granting Annuities, defendant.

Plaintiffs' Evidence

ALFRED H. GEARY, having been duly sworn, was examined and testified as follows:

Cross-examination.

By Mr. Shapiro:

- Q. Mr. Geary, you are one of the defendants named in this case as an officer or director of the Independence Shares Corporation?
 - A. Yes.
 - Q. Is that correct?
 - A. Yes.
 - Q. What is your office?
 - A. President.

Q. You are president of Independent Shares Corporation?

A. And director, yes.

Q. And director. Mr. Geary, recently there has been a sale of some of the securities held by the Pennsylvania Company as Trustee under an arrangement with your company, the Independence Shares Corporation, is that correct?

A. Yes.

[fol. 114] Q.. How many shares of the forty-two were sold?

A. Seven.

Q. That is, seven distinct kinds of shares?

A. Seven distinct issues.

Q. That leaves the portfolio down to thirty-five, is that right?

A. Yes.

- Q. How much money was received as a result of that sale?
 - A. I have not seen the figures yet.

Q. Approximately.

Mr. Irwin: He doesn't know.

Mr. Shapiro: Pardon me, you are not testifying.

By Mr. Shapiro:

Q. Approximately, Mr. Geary.

Mr. Irwin: He said he doesn't know.

The Court: Mr. Irwin, of course, when you say he doesn't know, you can object, but you can't testify for this witness.

Mr. Irwin: I object, sir.

The Court: Mr. Shapiro proceeded to ask him the approximate amount.

Mr. Irwin: If it isn't the exact amount, is there someone

here who can give us that?

Mr. Shapiro: I never heard of this kind of procedure before.

The Court: I have already spoken.

Mr. Shapiro: I know your Honor has. I neglected to say that this witness is called as under cross-examination.

By Mr. Shapiro:

Q. I imagine somewhere in the books the amount is recorded, is that right?

[fol. 115] A. The distribution is being audited right now by certified public accountants.

Q. I know you said about the distribution—

Mr. Irwin: I object, sir, to Mr. Shapiro's making remarks and not asking questions.

The Court: I know, but the witness didn't make a respon-

sive answer to the question.

By the Court:

Q. What was the amount received out of the sale of these seven issues? Can you give it to us approximately? A. \$700,000.

By Mr. Shapiro:

Q. \$700,000. What is the procedure you are now following with the distribution of that money?

A. What is the procedure we are now following?

Q. What is being done by the company with the money? What will be done by it in the course of the next few days?

A. The company has nothing to do with the money. The money is in charge of the Trustee.

Q. Who sold the shares?

A. Members of the New York Stock Exchange.

Q. Who ordered the sale?

A. The Pennsylvania Company. •

Q. Who gave them an order to order that sale

A. Independence Shares Corporation.

Q. Then you, in the first place—your company ordered the sale, didn't you?

A. Yes.

Q. What commission did the company charge for making that sale against the fund?

A. We haven't charged any commission.

Q. What is your charge for making that sale?

A. The distribution is distributed in cash under the deed of trust.

Q. Don't you make a charge against the fund for that sale?

[fol. 116] A. There is a fee for the Trustee.

Q. What is the fee?

A. It is limited, and it is in accordance with the activity of the trust in the preceding six months' period.

Q. You mean the Pennsylvania Company?

A. The Pennsylvania Company, yes.

Q. Isn't it true they get twenty-five cents a share as their only fee?

A. It is not true.

Q. The twenty-five cents is a commission?

A. That has nothing to do with the trust. That is in accordance with the plan. It has nothing to do with the distribution.

Q. Doesn't the Independence Shares Corporation charge a two and a half percent commission on that \$700,000?

A. That was formerly a charge which was returned to the Trustee by way of fees. There will be no two and a half per cent charged on this distribution.

Q. There has been up to this time?

A. That was customary, two and a half per cent of the amount to distribute.

Q. When you made the distribution you sent it to the persons in interest—I don't know what you call them—less that two and a half per cent up until this time, at least, didn't you?

A. That is correct.

Q. And less what other charges?

A. Less no other charges.

Q. You have a right from all of your investors, or from a major portion of them—a right to reinvest, don't you?

A. Yes.

Q. So, there are a number of epople who won't get a proportionate share of this distribution, but will leave it there for the purpose of reinvestment, is that correct?

A. That is correct. They have been put on notice to that, effect.

[fol. 117] Q. How many of those persons, would you say? What is the proportion of those who leave it for reinvestment as compared to the whole?

A. A fair majority, I would say.

Q. When you say reinvest that, up until this time, at least, you charged a 4 per cent commission for reinvesting—the Independence Shares Corporation—isn't that right?

A. That's correct.

Q. And then you charged a 9 per cent overwrite on that, didn't you, up until this time?

A. If you are talking about 4 per cent, you are talking about the Independence Shares Purchase Plan. When we charge 4 per cent there isn't any other charges.

Q. When you charge 4 per cent there isn't any other

charges?

A. No, sir.

Q. There has not been up until this time?

A. No, sir.

Q. That 4 per cent is above the two and a half per cent, isn't it?

A. Yes.

Q. When you charge the 6—what is the 65-cent charge you are now making instead of 9 per cent?

A. That is a deduction in connection with any pay-

ments on the purchase plan.

Q. What does that mean?

A. We are engaged at present in the sale of Independence Trust Shares on the Independence Trust Shares Purchase Plan. From each payment there is a six and a half per cent deduction.

Q. By whom?

A. By the Trustee payable to our company.

Q. Then it is eventually a 6½ per cent charge by the Independence Shares Corporation?

A. That is correct.

Q. From each investment? [fol. 118] A. That is correct.

Q. Won't that happen when you reinvest?

A. Only on initial payments, only on principal payments. It has nothing to do with the distribution.

Q. That is over and above the sixty dollar creation fee,

isn't it, that 61/2 per cent?

A. Yes.

Q. And that has been substituted for the 9 per cent overwrite which was the original charge?

A. Yes, sir; substituted for the 7½ per cent overwrite.

Q. See if you can follow me. When you reinvest this money for those who gave you the authority to do it, what they get is an Independence trust share, or a multiple of Independence trust shares, isn't that right?

A. That's right.

Q. And when you give them those shares, how do you figure how many they are entitled to get?

A. Depending upon the market price.

Q. No charge at all?

A. A mark-up of 7½ per cent, as I testified before.

Q. I mean even now, the first transaction is completed, you have issued shares to me, I am one of your investors, you have charged me in that the 2½ per cent commission, and you have charged me the 9 per cent overwrite, whatever it was—at that time it was S per cent. Now, you have got some stocks, you have sold them, and being an investor in Independence Shares Corporation, I am entitled to a dividend.

A. That's right.

Q. Out of the \$700,000?

A. That's right.

Q. Suppose I get the cash, how much charges are deducted and put against my share of the cash?

A. Whatever the Trustee's fees for the prior period

were.

Q. What is that?

A. Limited to one cent per trust share semi-annually. [fol. 119] Q. What does Independence Shares Company get?

A. Nothing.

Q. No deduction from them?

A. No, sir.

Q. Suppose I am an investor.

A. Subject to the retail price for the Independence trust shares, which includes a mark-up of 7½ per cent.

By the Court:

Q. What about this 4 per cent which you mentioned

a moment ago?

A. That is the current deduction, your Honor, in connection with Independence Trust Shares Purchase Plan. In other words, when dividends are reinvested on plans of that type that were sold, there is a deduction of 4 per cent in lieu of the 7½ per cent.

By Mr. Shapiro:

Q. In other words, if this whole 7-

Mr. Irwir : Let him finish.

By Mr. Shapiro:

Q. I beg your pardon, were you finished?

A. Yes.

Q. This whole \$700,000 were to be reinvested, under your arrangement, then, the first thing that would happen is that you would deduct 4 per cent on that, or \$28,000?

A. No, sir.

-Q. How much per cent?

A. No deduction except for the Trustee's fee, which is not figured in percentage. I don't know what the fee will be; the audit has not been completed as yet.

Q. Whose fee?

A. The Pennsylvania Company's fees.

Q. I am talking about Independence Shares Corporation.

A. So am I.

Q. Not Independence Company.

[fol. 120] Mr. Irwin: If your Honor please, this witness already said Independence Shares Corporation got nothing from that sale.

The Court: Go on with the next step. That is correct.' Go on with the next step.

By Mr. Shapiro:

Q. When the \$700,000 is invested, what is this 4 per cent charge that you told the Judge is made up against this fund?

A. The 4 per cent charge is the amount that is deducted from that portion of that distribution that is payable to the holders of Independence Trust Shares Purchase Plan.

Q. All right. Wi'l you tell me how that would work out in this \$700,000 sale that you have just now made?

A. I don't know how much is allocated to that particular item.

Q. You said the major portion of it would be for re-investment?

A. That's right.

Q. The portion that is not for reinvestment you said would be charged with 4 per cent?

A. 'No, I did not.

Q. I thought you did.

A. I did not. I shouldn't have, if I did ...

Q. Well, what is that 4 per cent you talked about? I can't get it clear.

Mr. Bohlen: I think I can clear it up— Mr. Shapiro: I object, if your Honor please.

The Court: I will sustain the objection. Let the witness

answer.

The Witness: Let's have two distinctions here. I think I can make it clear if we do.

[fol. 121] By Mr. Shapiro:

Q. I wish you would. Go ahead.

A. Under the capital savings plan the amount of distribution if reinvested is subject to the regular creation price of trust shares of 7½ per cent.

Q. What do you mean, "Creation price"? You mean

a creation charge of 7½ per cent?

A. Yes.

Q. And what is that 7½ per cent? Of what, I mean? Seven and a half per cent of what?

A. Seven and a half per cent of the market price of

the unit.

By the Court:

Q. That is a 7½ per cent mark-up on the price of the security?

A. Yes, it figures 6.8 per cent of the purchase price.

By Mr. Shapiro:

Q. Independence Shares Corporation receives 71/2 percent of the purchase price?

A. 6.8 per cent.

Q. M right, that is what you eventually get?

A. Yes.

Q. What other mark-up is put in that?

A. No other.

Q. Don't you include the dividends that are accrued but not paid?

A. That is included in the distribution.

Q. That is included in the price, isn't it?

A. It is included in the distribution. The shares sold ex-dividend on February 28th, ex the amount of the proceeds of the sale of the stock, and ex the amount of the dividend currently distributed April 1st.

Q. When you buy stock which is sold with the dividend, and buy stock which entitles you to a dividend to be recived later, you include the dividend in the price, don't you?

[fol. 122] A. That's right.

Q. And when you get the dividends you distribute them, don't you?

A. Yes.

Q. When you distribute them what charge do you make against that dividend?

A. There are two different procedures. Q. I know; you tell us both procedures.

A. I am trying to make it clear. There are two different types of procedures. In one procedure there is a 4 per cent deduction for our company.

Q. You mean Independence Shares Corporation?

A. Period.

Q. What do you mean, 4 per cent of what?

A. Of the amount of the distribution to be reinvested.

Q. What is the next?

A. That is in connection with the Independence Trust Shares Purchase Plan. In connection with the capital savings plan there is a mark-up of 7½ per cent on the distribution that is used to purchase additional trust shares.

Q. That costs the investor 11½ per cent, as I total it

uppisn't that correct?

(Laughter.)

The Court: Let's have a little order. As I understand it, there are two courses that may be pursued. If one course is pursued there is a 4 per cent charge; if another course is pursued it is 7½ per cent. The two are not added together.

The Witness: That is correct.

Mr. Shapiro: There is a great deal of laughter, but the smirk will come off the face. I am over twenty-one years of age. This gentleman is talking about Independence Trust Shares and capital savings, and it is the same thing. What this gentleman means—

Mr. Irwin: If your Honor please, I object to any remarks

by Mr. Shapiro.

[fol. 123] The Court: It was brought on by the laughter from counsel table. I can't conceive of a proceeding of this kind being tried in anything but an orderly manner.

I will adjourn for the day if it keeps up. I am not going to sit here and listen to bickering between counsel brought on by—well, the kind of tactics that shouldn't have any place in a courtroom. Address your objections to the Court, Mr. Irwin; and, Mr. Snapiro, you do the same thing.

Mr. Shapiro: Very well, sir. Mr. Irwin: I have tried to.

By Mr. Shapiro:

Q. What you mean is that the first part of your proceeding is the purchase of these forty-two shares of stock and the second part of it is the issuance of an Independence Shares Corporation stock certificate to the investor; that is what you mean. I mean the first thing that happens in this picture is that certain shares of stock are bought at the suggestion of Independence Shares Corporation, or on its order, and then certificates of Independence Shares Corporation are issued to the investors?

A. No. sir.

Q. Will you tell me what happens?

A. I will. In the first instance, Independence Shares Corporation acts strictly as a depositor.

Q. What do you mean by that?

A. I will explain. With its own funds it purchases the units of stock in the trust, in the Independence trust.

Q. Tell us what-

Mr. Irwin: Let him answer the question.

Mr. Shapiro: I am examining the witness.

Mr. Irwin: May I ask your Honor

The Court: You should address your objection to the Court.

[fol. 124] Mr. Irwin: I am sorry.

The Court: May I suggest, Senator, that he give his explanation, and then you question him on it?

Mr. Shapiro: I thought he had given it, and I wanted to follow it up.

By Mr. Shapiro:

Q. Suppose you start all over again, it will be better.

A. The Independence Shares Corporation purchases with its own funds the unit of stock or units of stock of the Independence trust. In other words, it buys five shares of United States Steel, five shares of General Motors, five shares of Allied Chemical, and so on.

Q. That is the basic stock, you mean?

A. The basic stock. Those stocks are then deposited under a trust agreement with the Pennsylvania Company. Against the deposit of each unit of stock the Pennsylvania Company issues one thousand Independence Trust Shares.

Q. To whom?

A. To the purchasers of the plans as their money is paid into the Pennsylvania Company as Trustee and/or custodian.

Q. Does that finish your explanation?

A. Yes, sir.

Q. Will you follow those steps in this way? When the shares are purchased by the Independence Shares Corporation—when I say the shares, I mean the basic stock—when they are purchased, then, of course, a record of the price, the market price of that stock is noted somewheres, it is available.

A. It is kept in our office.

Q. Are there any charges added to that as the cost price before it gets into the hands of your Trustee, the Pennsylvania Company?

A. There are no charges, the brokerage.

Q. The brokerage charge is added?

A. That is correct.

[fol. 125] Q. What else?

A. Whatever we have to pay—whatever brokerage we pay we proportion in the make-up price of trust shares,

Q. When those shares come to the Pennsylvania Company, against them are issued your Independence shares stock to the purchaser—

A. Let's give them the proper terminology; Independence Trust Shares, they are not Independence Shares Corporation stock.

Q. Doesn't the purchaser get the shares of Independence Shares Corporation?

A. No. He has nothing to do with shares of the Independence Shares Corporation.

By the Court:

Q. Who owns the Independence Shares Corporation?
A. Our stockholders.

By Mr. Shapiro:

Q. Who are they?

By the Court:

Q. That is separate and distinct from plan holders?

A. Yes, sir.

By Mr. Shapiro:

Q. Who are they?

Mr. Irwin: I object. I don't see why we should disclose to Mr. Shapiro who our stockholders are. He said he was going to examine along certain lines.

Mr. Shapiro: I am not talking about anything but mis-

representations.

The Court: I can't understand an objection that goes to the identity of the defendant.

Mr. Irwin: The identity of the defendant-

The Court: I suppose the information is available somewhere.

[fol. 126] Mr. Irwin: If your Honor will care to have it, Mr. Geary will present it.

The Witness: I will be glad to present a stockholders'

list.

By Mr. Shapiro:

Q. Who are they?

A. I haven't a list with me. We have some fifteen or so stockholders.

Q. Fifteen or what?

A. Fifteen or so.

Q. What is the capital stock of the Independence Shares Corporation? What is the stated capital stock?

Mr. Irwin: If your Honor please, I thought Mr. Shapiro

was going to confine his examination-

The Court: Questions are always relevant as to the identity of the defendant. Objection overruled, exception granted.

By Mr. Shapiro:

Q. What is it?

A. Stated value of the stock?

Q. Yes.

A. \$65 a share.

Q. I mean the total.

A. 1058 shares outstanding.

Q. 1058 shares. What is the total amount paid in?

A. \$111,800.

Q. Is that cash paid in?

A. Yes, sir.

Q. Those shares are controlled, you say, among fifteen or seventeen stockholders?

A. That's right.

Q. That was the original amount that was paid in?

A. That is the total amount.

Q. Up to date?

A. Yes.

[fol. 127] Q. Getting back to the Independence Trust Certificate, as you call it, when that—

A. Independence Trust Shares.

Q. Independence Trust Share, when that is finally issued to the investor, he pays for the basic stock what you paid for it, including the brokerage commission—

A. He doesn't pay for it what we pay for it. What we

pay for it has nothing to do with it.

Q. You didn't let me finish the question.

A. I want to make that clear.

Q. Suppose we take it your way. You say it has nothing to do with it, what you pay for it; what do you mean by that?

A. If he purchases for trust shares at the market price certain underlying stocks, at the day the Pennsylvania Company makes the purchase for him——

Q. You have already bought it in advance?

A. That makes no difference. We have to assume the risk of carrying it at a profit or a loss.

Q. I don't follow you. I thought you said first you buy

the stock.

A. I did; we do.

Q. Then the investor gets the certificate?

A. The investment is being made day by day.

Q. Yes.

A. An investment that is made today is made at a price which is based on the closing price of the stocks in the unit on the day previous. In other words, we may have bought the shares on last Thursday's market. If the shares had gone off between Thursday and today, the investors would

pay today's price regardless of the price that we paid for the shares.

Q. And if it went up the investor would pay today's price, also?

A. That is correct.

Q. What happens to that profit? Who gets that?

A. We get that.

[fol. 128] Q. You get that?

A. Or loss.

Q. I understand.

A. There is a double risk.

Q. Yes, I understand that. That is what I want to know. So that in this transaction all of these shares of stock that are being deposited with the Pennsylvania Company before the investor comes into the picture are subject to a loss or profit by you, the Independence Shares Corporation?

A. That is correct.

Q. That is correct, isn't it? And then when he comes in today to pay, the investor pays its present market plus what other charges do you put on it? What other charges are added to that?

A. There are two sets of charges, which is something we don't seem to be able to make clear.

Q. Now, we are at the point-

Mr. Irwin: Now-

By Mr. Shapiro:

Q. I am putting the question so we don't misunderstand each other. We are now at the point where there is in the possession of the Pennsylvania Company some basic stock, and I am the investor, I am going to participate. You are going to issue a certificate to me, a trust certificate. You sell me that stock, and you issue the trust certificate to me upon the basis of the market of that stock today plus what charges?

A. Plus seven and a half per cent in the case of the Capoital Savings Plan. Contract certificates—

Q. Won't you-

A. There are two separate and distinct sets of charges, please.

Q. Won't you take my question?

Mr. Irwin: May I ask that the witness be permitted to answer the question?

[fol. 129] The Court: I think you would save time, Mr. Shapiro, that way.

Mr. Shapiro: I will only have to go back.

The Court: We will go back again.

Mr. Shapiro: He hasn't answered my question. I want to know what does the man pay, what charges are added to a man who buys an Independence Trust Certificate which he talked about. I want to know—

By the Court:

Q. What does a man pay that buys an Independence Trust Share?

Mr. Shapiro: He calls it a certificate.

Mr. Irwin: I think your Honor has the correct terminology and that Mr. Shapiro is confused about that.

The Witness: Independence Trust Shares are sold to the Pennsylvania Company under two separate and distinct plans.

By the Court:

Q. What is plan No. 17

A. Plan No. 1 is the Capital Savings Plan.

Q. What is the other plan?

A. Contract certificate. Plan No. 2 is Independence Trust Shares Purchase Plan.

By Mr. Shapiro:

Q. What is the difference between the two?

A. One is a custodianship agreement; one is a trust contract certificate.

Q. What does that mean? What does "custodianship

agreement" mean?

- A. The custodianship agreement is a more simple plan. It isn't such a cumbersome contract. The entire agreement is on the certificate, including the imposition of cerfol. 130] tain responsibilities on the Pennsylvania Company as custodian, as it does on the Pennsylvania Company as Trustee.
 - Q. What is the other plan? A. Capital Savings Plan.
- Q. What does that mean? What is the difference between that and the other one?

A. That establishes a trust relationship with the bank in connection with the investing of the periodic payments and the holding of the trust shares.

Q. Whatever it is-

The Court: May I say one thing to you? I have a luncheon engagement at quarter of one.

Mr. Shapiro: I will be through before that.

By Mr. Shapiro:

Q. My question is what under those two plans is charged against the stock in the instances I talked about?

A. I will be glad to explain it.

Q. In addition to the actual market value.

Mr. Irwin: If your Honor please, may I ask Mr. Shapiro to indicate the instances that he refers to?

The Court: At the very inception.

Mr. Shapiro: If this gentleman doesn't understand my question—

By the Court:

Q. Assuming that one subscribes to the capital plan we

will call it, what happens then?

A. His payments after deductions for the Pennsylvania Company fees and for our \$60 service fee are then used to purchase Independence Trust Shares at a mark-up of 7½ per cent.

Q. And in the case of the other, the Independence Trust

Shares Plan.

A. There is no mark-up on the trust shares; a deduction of $6\frac{1}{2}$ per cent from his payment, unless his payments—well, I won't qualify it.

[fol. 131] By Mr. Shapiro:

Q. What do you mean there is a deduction?

The Court: He wants to qualify it.

The Witness: I don't want to qualify it.

By Mr. Shapiro:

Q. What do you mean, there is a deduction of 6½ per cent?

A. Just that.

A. That is correct.

Q. That leaves him sixty-five cents less to invest?

A. That is correct.

Q. It amounts to the same thing as 61/2 per cent?

A. That's right

Q. Are there any other charges in addition to that at that particular time?

A. Not on principal payments, no.

Q. What other payments?

A. There are different fees. It is all explained in our prospectus.

Q. I am not asking you about your prospectus. I would like you to answer the question. Up until that point there are no further charges, are there?

Mr. Irwin: I object to that remark of Mr. Shapiro's.

The Court: I will sustain your objection.

Mr. Shapiro: I want this witness to understand my question.

By Mr. Shapiro:

Q. I am not talking about what you have in your prospectus; I am talking about what you do. The second question I am asking you is after that phase when is the next charge? [fel. 132] A. There isn't any charge.

You said not on principal payments. What do you mean by that? Let's put it this way: You have had both

kinds of those transactions.

A. Yes.

Q. You have investors of both types?

A. Yes.

Q. You have one figure of \$700,000, approximately, which represents basic stock in both types of investments, you have told me.

A. That's right.

Q. In making distribution to those <u>people</u> of both types when you do it by cash, what are the charges made against those people, against their share of that \$700,000?

A. The only charge is for the administration of the trust

imposed by the Pennsylvania Company.

Q. And no charge for distribution to them as a dividend of this money?

A. No, sir.

Q. Did you do that before? Was there an occasion before

today when you made that charge?

A. The charge has been changed; there was a charge of $2\frac{1}{2}$ per cent to the Pennsylvania Company.

Q. When was that change made?

A. The change was made effective sometime in December of this year.

Q. December of this year?

A. Of last year, I mean.

Q. By resolution of the board of directors?

A. By a supplemental trust agreement executed between the bank and ourselves.

Q. It was some time in December of last year?

A, Yes.

Q. What charge did you substitute for that 2½ per cent charge?

A. An indefinite charge; it is limited only as to a maximum.

Q. What do you mean by that?

[fol. 133] A. There is a maximum limit on it.

Q. What is the maximum?

A. One cent per share semi-annually.

Q. Who gets that one cent?

A. The Pennsylvania Company.

Q. Don't you get any of it?

A. No.

Q. The 21/2 per cent went to you?

A. And was paid back to the Pennsylvania Company for administrating the trust. The procedure was to indorse the check over to the bank the minute we got it.

Q. When you reinvest for any of these who—by the way, do you have authority to invest in both types of cases, or

only in one?

A. We have authority to invest as it was originally given to us in the first place.

Q. That is what I mean. Do you get authority to invest

in both types? .

A. It depends on what authority is given to us at the time of the purchase.

Q. Then you have some cases in which you have authority to reinvest for both types of plans?

A. That is right.

Q. When you reinvest this \$700,000 for those people for whom you have authority to reinvest, what will the charge be?

A. The charge will be in the case of the Capital Savings Plan a mark-up in the shares of 7½ per cent.

By the Court:

Q. In other words, you go through the same steps as you did originally?

A. In the case of the Independence Trust Shares Purchase Plan, there will be a deduction of 4 per cent allocated to that particular one.

Q. In the case of Exhibit C-15, it calls for nineteen shares of Independence Trust Shares to Albert A. Masciangelo, [fol. 134] In estimating the amount that was charged to this gentleman for that certificate you said the other day, I think—if I am wrong, you correct me—there was included the market value of the basic stock at the time of the purchase by him plus certain other charges one of which I think you said was the broker's commission?

A. Brokerage commission and taxes.

Q. Brokerage commission and taxes?

A. That is right.

Q. And accumulated dividends if they had been declared but not paid?

A. That is right.

Q. What brokerage commission did you charge?

A. Regular stock exchange commission.

Q. Did the Capital Savings Plan, Inc., or the Independence Shares Corporation have a broker's license?

A. We have an investment dealer's license, yes.

Q. Did you have a broker's license which would authorize you to carry this transaction out on the stock exchange?

A. No.

Q. So, you had to use another broker to do that?

A. We purchased it through regular members of the New York Stock Exchange.

Q. Always

A. Always.

Q. And you always paid the regular brokerage commission?

A. Yes.

Mr. Irwin: Are you referring to the underlying securities of Independence Trust Shares?

Mr. Shapiro: He knows what I am referring to; if he

doesn't know I would like him to tell me.

The Court: Let's not argue.

Mr. Shapiro: I am saying if he doesn't know I would like him to tell me. I don't want to be interrupted. This is awfully difficult to follow, these names.

[fol. 135] The Court: I am sure Mr. Geary if he isn't clear

on the question asked by Mr. Shapiro, will so state.

By Mr. Shapiro:

Q. Who was Clifford Keef?

A. He was a former employee of Independence Shares Corporation.

Q. That doesn't give me much information about him.

Can you give me some more?

A. Clifford Keef executed the orders for the purchase of underlying stocks when we needed them.

Q. How did he execute those orders?

A. Gave the orders:

Q. He gave the orders? I don't understand what his duties were; will you tell me what they were?

A. He was, among other things, the order clerk who placed the orders for the stocks if we needed them with brokers who were members of the New York Stock Exchange.

Q. Was he a broker?

A. No, he was not. By a broker I take it you mean a member of the New York Stock Exchange?

Q. Was he the man who would have the right to sell this

stock on the Exchange?

A. He was the man that had the right to place the orders for our company.

Q. On the Exchange?

A. No, with a member of the New York Stock Exchange.

Q. Let us see if I understand it. You say that whenever you charged a brokerage commission, the regular brokerage commission in ascertaining the price of this or other similar trust shares, Independence Trust Shares, you charged the regular brokerage commission?

A. Regular brokerage commission that was set up by the

New York Stock Exchange.

Q. Did you always pay a regular broker's commission in each one of these transactions?

[fol. 136] A. Yes.

Q. You never bought these shares through Mr. Keef and

paid him a salary to do that work for you?

A. Mr. Keef was paid a salary as order clerk, not as general trader to conduct a general trading business in investment trust shares, or other types, including Independence.

Q. Isn't it a fact, or is it a fact, that in many of these transactions the only thing you paid to consummate the transaction was the salary you paid to Mr. Keef?

A. I don't follow that question at all.

Q. You don't?

A. No.

Q. What I am trying to find out-

Mr. Irwin: Let him repeat it. Mr. Shapiro: May I proceed, sir? The Court: Yes.

By Mr. Shapiro:

Q. What I am trying to find out very plainly is—

Mr. Irwin: The witness asked to have the question repeated.

The Court: Mr. Shapiro is trying to explain what he means.

By Mr. Shapiro:

Q. What I am trying to find out is whether or not you actually didn't pay brokerage commissions in many cases and charged them without having paid them?

A. That is not so:

Q. It is not so?

A. No.

Q. Last week you said to me the amount of paid in capital stock of this corporation, Independence Shares Corporation, was \$111,000.

The Court: \$111,800.
[fol. 137] The Witness: \$111,800.

By Mr. Shapiro:

Q. Did you understand my question? A. Yes, sir; I did. Q. My question was how much did the stockholders pay in for their stock?

A. That is exactly it.

Q. And you said \$111,000?

A. \$111,800, that is it.

Q. I have before me a prospectus of Independence Trust Shares for June 14, 1938—I imagine somebody can present you with a copy of this——

Mr. Irwin: Here it is.

(A paper was produced and shown to the witness.)

By Mr. Shapiro:

Q. Will you look at page 27? Proceed from the back so you won't get confused about certain double numbers. Have you page 27 headed "Independence Shares Corporation, registrant"?

A. Yes, sir.

Q. Look at the right-hand corner under capital: Capital stock, par value, \$100 per share, authorized and issued, 50 shares, \$5000?

A. That's right.

Q. Capital surplus \$8601.44; earned surplus, note C, \$15,-590.39; total capital, \$29,191.83. How do you explain that statement with yours that there was \$111,000 paid into the capital stock?

A. I was speaking of the Independence Shares Corporation as it now exists, which represents a merger of the Savings Plan, Inc., and the Independence Shares Corporation; all of whose capital Capital Savings Plan formerly owned, and by Independence Shares Corporation I was referring to the survivor of the merger of the two companies.

Q. The question I put to you was how much money was paid by the stockholders for the capital stock, and you told [fol. 138] me \$111,000. I asked you in cash, and you said yes, in cash. How do you explain that?

A. I thought you were referring to the merger, the sur-

vivor of the merger.

Q. My question to you was —

A. Well, my answer answered the question.

Mr. Irwin: May I object? Mr. Shapiro asked how much was paid for the stock of Independence Shares Corporation.

Independence Shares Corporation today represents a merger between Independence Shares Corporation—

Mr. Shapiro: I object to this statement. This witness has

already told me what they were.

. The Court: Mr. Geary is capable of explaining it.

Mr. Irwin: I think it is unfair for Mr. Shapiro to try to make it appear that the witness told him something that was not true.

Mr. Shapiro: I am lasing those remarks on the record and

ask your Honor to permit the question.

The Court: Mr. Geary attempted to answer it when he

was interrupted. Proceed, Mr. Geary.

The Witness: The Independence Shares Corporation now is the survivor of a merger of the Capital Savings Plan, Inc., and Independence Shares Corporation. Prior to the merger, Capital Savings Plan, Inc., owned all of the capital stock of the Independence Shares Corporation. So, when I said that \$111,800, had been the amount paid in to the capital of the Independence Shares Corporation I was referring to the survivor of the merger of the two corporations.

By Mr. Shapiro:

Q. Then it was not paid in cash, the \$111,000?

A. I didn't say that.

Q. Didn't you say that?

[fol. 139] Mr. Irwin: Wait a minute. Be fair to the witness.

The Court: That is a proper question.

Mr. Shapiro: Your Honor, I am not paying any attention to those remarks.

The Witness: I testified it was paid in, in cash.

By Mr. Shapiro:

Q. When you said, "I didn't say that," you mean you don't say that now? I asked you whether it was all paid in in cash or not.

A. I say yes.

Q. How did the merger have anything to do with it? If the two of them merged, it wasn't paid in in cash, was it? If the one company took over the assets of the other, it wasn't a cash payment of \$111,000, was it?

A. Capital Savings Plan-

Mr. Trwin: If your Honor please, I submit this is unfair.
The Court: If Mr. Geary can't answer it because he thinks
it is ambiguous in its terms, he will so state.

By Mr. Shapiro:

Q. Mr. Geary, let me read your testimony of last week, if you please

A. I have read it.

The Court: He has repeated it. There is no inconsistency in his statement. He repeated it again today. He said, "I said last week there was \$111,800 paid in cash, I say so today."

By Mr. Shapiro:

Q. Do you?

A. Yes.

Q. You say \$111,000 was paid in cash?

A. Yes.

[fol. 140] The Court: I really must say to counsel I don't think that counsel has been listening to the witness. He so stated.

Mr. Shapiro: Mr. Irwin has been jumping up so that I didn't hear it.

By Mr. Shapiro:

Q. When was the \$111,000 paid in, in cash?

A. It was paid in originally to the Capital Savings Plan, treasurer of the Capital Savings Plan, Inc.

Q. By each of the stockholders?

A. Yes.

Q. After that there was a consolidation of the assets of the Capital Savings Plan with the Independence Shares

Corporation?

A. The steps were these, maybe this will clear it up: Capital Savings Plan, Inc., purchased with its own money Independence Shares Corporation, it purchased all of the outstanding capital stock of the Independence Sales Corporation. On December 31, 1938, the two corporations merged, the latter name retained, so that when I speak independence Shares Corporation as having that paid

in capital of \$111,800, I am referring to the Capital Savings Plan which is now known as Independence Shares Corporation.

Q. According to this report the value of the capital stock as of February 28, 1938, although \$111,000 was paid in, is only \$29,191, is that right?

A. That is not right.

Mr. Irwin: I object to that.

The Court: I will overrule your objection.

Mr. Irwin: For he is reading from Independence Shares Corporation.

Mr. Shapiro: That's right.

The Court: Mr. Geary can or cannot answer it. He may state it.

[fol. 141] Mr. Irwin: If your Honor please, if Mr. Shapiro

The Court: I will overrule the objection.

Mr. Irwin: If Mr. Shapiro-

The Court: Mr. Irwin, I take it for granted he is reading

from the statement of February 28, 1938.

Mr. Shapiro: Nobody said anything different. If Mr. Irwin wouldn't be in a hurry to accuse other people, and mind his own affairs; we would get somewheres. He has a right to object without making accusations against me.

The Court: Gentlemen, if you want this matter disposed of, we sill do so if we can proceed in an orderly fashion;

if we can't, I will continue the hearing for a week.

Mr. Shapiro: I am trying to avoid answering these unwarranted statements that have been made. I am entitled to the protection of the Court from counsel making the statements.

The Court: I have ruled on each occasion, Mr. Shapiro, so that the matter may be one of record. I say to you again, Mr. Irwin, and I say to you, Mr. Geary, if at any time you don't clearly understand Mr. Shapiro's questions, you so state.

.The Witness: Yes.

By Mr. Shapiro:

Q. Mr. Geary, so there will be no misunderstanding, I am trying to find out if on February 28, 1938, Independence Shares Corporation stock had a value of \$21,191 according to a copy of the statement that you have before you, where

would the difference between that and the \$111,000 that you

said was paid in come from?

A. At the date of this statement Independence Shares Corporation was wholly owned by Capital Savings Plan, [fol. 142] Inc. On December 31, 1938, the two companies merged and the latter name retained.

· Q. Will you tell me was the Capital Savings Plan, Inc.,

in existence at that time?

A. Yes.

Q. What was the amount of stock paid in, into the Capital Savings Plan, Inc.?

A. \$111,800.

Q. \$111,800?

A. That is correct.

By the Court:

Q. May I ask a question? Was the sum of \$21,000 the capital of Independence Shares Corporation, the wholly owned subsidiary of the Capital Savings Plan?

A. Yes.

Q. In other words, you are dividing it in this way: the \$111,000 was divided into \$90,000 and \$20,000, the \$20,000 belonging to the wholly owned subsidiary and the \$90,000 belonging to the former company?

A. Yes.

By Mr. Shapiro:

Q. You mean \$111,000 represents the amount the stockholders paid in for shares of both Capital Savings, Inc., and

Independence Shares Corporation?

A. It represented the amount the stockholders paid for shares of Capital Savings Plan, Inc., which was later exchanged, share for share, for shares of Independence Shares Corporation, which was the survivor of the merger.

Q. Then, in February, 1938, both companies were in ex-

istence?

A. Yes, sir.

Q. And \$111,000 represents the amount invested by the stockholders in both companies, not \$111,000 in one and \$21,000 in the other?

A. They only invested in one company.

The Court: Don't you see, Mr. Shapiro, Independence [fol. 143] Shares Corporation being a wholly owned subsid-

iary of Capital Savings Plan, there could be no other stock-holders?

May Shapiro: I understand. I used the word the other way, it is the investment.

By the Court:

Q. Is that so, as I stated?

A. Yes, sir.

By Mr. Shapiro:

Q. It is the investment of all the stockholders in both companies?

A. Only in the one company.

The Court: It is a question of terminology.

The Witness: The company, itself, made an investment in Independence Shares Corporation.

By Mr. Shapilo:

Q. That is correct, and the assets represented the interest they had in both companies?

A. That is right.

Q. Were the stockholders the same in both companies?

A. No.

The Court: If it was a wholly owned subsidiary—
Mr. Shapiro: I don't mean the stockholders, I mean offi-

The Witness: Substantially the same.

By Mr. Shapiro:

Q. What difference was there, if any?

A. I don't recall.

Q. Under what written authority did you make the substitution of securities, or, rather, make the sale of securities recently that we spoke about last week?

A. Under the authority of the trust indenture creating the

trust.

cers.

[fol. 144] Q. Have you a copy of it?

A. I think so.

Q. Is it in any of the papers that I showed you this morning? For instance is it C-14?

A. No, that is not it.

- Q. What do you mean, that is not it? You haven't looked at it?
 - A. I know what that is.
 - Q. You do know what that is?

Mr. Irwin: Mr. Shapiro, we will try to find out for you.

By the Court:

Q. May I ask a question at this point? Are there two plans in operation now? Do you have two methods of savings or just one?

A. Only one type being sold, but two types being serviced.

Q. There was one discontinued?

A. That's right.

By Mr. Shapiro:

Q. What I am trying to find out is where did you get the authority from?

A The agreement.

Q. With whom? Who were the parties to the agreement?

A. Independence Shares Corporation and The Pennsylvania Company were parties to the agreement.

& Nobody else!

A. Those people who purchased Independence Trust Shares.

Q. They had something to say about it?

A. No.

Q. They did not?

A. No.

Q. You mean without any authority from the invest-

[fol. 145] A. That was a right that was vested in the depositor corporation.

Q. Where is that shown, that you had that right vested in the corporation?

A. It is right in the agreement of trust.

Q. I am not talking about this agreement of trust with the Pennsylvania Company. What papers have you got from the investors that gives you the right to do that? That is what I am interested in.

A. To eliminate shares?

Q. Yes.

A. Don't need any; it is right in this original indenture.

Q. That is the indenture between the Pennsylvania Company and Capital Savings and Independence Shares Corporation?

A. No, it is in the indenture between Capital Savings 'Plan and Independent Shares Trust, and always has been.

Q. That is what you said.

A. That is what you asked me.

Q. I am asking you where the authority-

A. I get it right in this trust agreement.

Q. Pardon me, what agreement have you with the investor authorizing you?

A. To set him Independent Trust Shares?

Q. You don't listen to my question.

Mr. Irwin: If your Honor please, I object to that characterization of Mr. Geary's testimony by Mr. Shapiro.

The Court: It wasn't a characterization. I am sure Mr.

Shapiro meant no reflection.

Mr. Shapiro: I didn't reflect on him. I said he didn't

listen to my question.

The Court: You might have proceeded in another way, Mr. Shapiro.

[fol. 146] By Mr. Shapiro:

Q. What writing have you with the investor that gives you the authority to substitute or to sell some of his stock, the basic stock?

A. I haven't any authority in writing. It is contained in the original declaration, the agreement of the declaration of trust.

Q. What is the date of that original declaration of trust?

A. The second day of April, 1930.

Q. The second day of April, 1.30?

A. Correct.

Q. After you sold to investors, how would they know about that particular agreement?

Mr. Irwin: If your Honor please, I think that is a question that covers the whole world; I mean how they do know.

The Court: I will overrule your objection and grant you an exception

By Mr. Shapiro:

Q. How do they know about that?

A. They know about it, it is contained in the Independence

Trust Shares certificate.

Q. In the Independence Trust Shares certificate. I show you a paper which has been offered in evidence and is marked Exhibit 15 now. It is entitled Independence Trust Shares certificate. Is that the first time he knows about it, when he gets that certificate?

A. It is in the

Mr. Irwin: If your Honor please, I think that the witness should have an opportunity to answer the question before Mr. Shapiro asks him another question.

The Court: You asked him two questions.

Mr. Shapiro: No, I haven't

[fol. 147] The Court: You asked him first, is that the certificate which is issued, and then is that the first time he knows about it.

Mr. Shapiro: He already said that.

By Mr. Shapiro:

Q. Is that the certificate?

A. That is the certificate.

Q. Is that the first time he knows it?

A. It is in the plan agreement that he gets.

The Court: I think if you had asked the question is there anything said to the prospective planholder, or whatever you call him, of the existence of this provision in the trust indenture before he receives the certificate, after he becomes a member——

Mr. Shapiro: That is where I don't agree with your Honor. These people know exactly what I am driving

at, they have slept with this.

By the Court:

Q. I would like to know specifically was anything said to these prospective purchasers before they actually became purchasers to the effect that the Independence Shares Corporation had this right of elimination. That is a very definite part of the whole plan. Can you answer that? Did your sales force tell them?

A. Yes, sir, instructed to tell them.

By Mr. Shapiro:

Q. Any written instructions on it? Any written information about it?

A. I think so, probably.

Q. You don't know?

A. I can't recall all the instructions. We are sending

out instructions all the time.

Q. Who made up this printed matter I have offered here? Who made up this printed matter that I have offered in [fol. 148] evidence? Is it gotten up under your supervision? You are the executive officer, I understand?

A. Yes, I am. :

Q. Don't you know what the certificates and papers show!

A. Yes, I know.

Q. You know. Do these prospectuses, or any of them, show you have that trust agreement and those rights under the trust agreement?

A. Oh, yes.

Q. Which one? Show it to me.

The Court: Won't you refer to them by number?

Mr. Shapiro: Yes, as soon as he picks them out.

The Court: I don't think there was any reference to this other agreem-nt.

Mr. Shapiro: I didn't offer it, I haven't identified it.

It is not one of my papers.

The Court: I am speaking of this agreement of April 2, 1930.

Mr. Shapiro: Yes, I will come to that.

Mr. Irwin: One of the exhibits-

Mr. Shapiro: I wish Mr. Irwin would allow the witness to find his own papers and do his own testifying. I don't want to be shown any papers unless I ask for them, if your Honor pleases. I want this witness to answer the question without help from counsel.

Mr. Irwin: If your Honor please

Mr. Shapiro: You might as well tell the witness the answer.

The Court: This witness was called for cross-examination, Mr. Irwin. [fol. 149] Mr. Irwin: I understand, but Mr. Shapiro hands

him seventeen exhibits and says, "Look through there and find out."

Mr. Shapiro: I haven't done that, your Honor. I asked him to pick it out from my papers or anywhere else.

Mr. Irwin: I shall pick it out of your exhibits.

Mr. Shapiro: I don't want you to pick it out; I want the witness to pick it out.

The Witness: Page 5-

Mr. Irwin: Don't you want to get the facts?

Mr. Shapiro: May I address your Honor, and not Mr. Irwin? I don't want to pay any attention to his remarks. Every time I say something he uses it as an excuse to do something highly improper. I have practiced law too long to get worked up over nonsense.

By Mr. Shapiro:

Q. You are reading from page 5, Mr. Geary, of what?

A. I don't see what.

Q. You have apparently turned the page, Mr. Geary. I know which one it is, the first page is loose. Exhibit C-8.

A. Exhibit C-8, page 5.

Q. What is that paper?

A. It is Independence Trust Shares' prospectus.

Q. Don't take that first page away, I am going to ask you about it. What is the date of it?

A. January 3, 1939.

Q. That isn't the first time that any of your prospectuses called attention to that, is it?

A. No.

Q. I want to see it earlier.

A. You said find it in any one.

Q. Yes.

A. Which one would you like to see it in? [fol. 150] Q. Any earlier ones?

A. Yes.

Q. Give me the first prospectus in which you advertised that?

Mr. Irwin: Take your time, Mr. Geary, and look through the whole thing.

The Witness: This is a prospectus of April, 1935. It appears on page 8.

By Mr. Shapiro:

Q. May I see that, please?

8-17 & 18

A. Certainly.

The Court: Will you give us the exhibit number on that?

Mr. Shapiro: Exhibit No. C-2, page 8, under the heading elimination.

The Witness: Yes.

By Mr. Shapirg:

Q. Will you read that to the Court, please?

A. Certainly.

Q. The portion which you say refers to and gives you the rights contained in the trust agreement of 1930 that you just called to my attention this morning.

A. "Elimination of any stock whose further retention

would be inadvisable,--' that is the shares-

"In the course of years, changes may be likely to occur in particular companies or industries represented in our portfolio that would make retention of the investment in some of the present companies unwise. With this in mind, the Trust Agreement provides that, should the Depositor" -which is the Independence Shares Corporation-"conclude that the stock of any company in the portfolio may or will become substantially impaired in value, the Depositor may instruct the Trustee to sell such stock. It is not necessary to await the occurrence of some specific event [fol. 151] before eliminating an impaired stock, nor does the occurrence of any specific event compel elimination when retention of the stock may be advisable. The proceeds of the sale of an eliminated stock are distributed to shareholders at the next semi-annual distribution date. No substitution is permitted. The portfolio is sufficiently large so that even if half the companies should be eliminated, to take an extreme example, a sound diversification would remain."

Q. May I have that agreement of 1930 that you referred to this morning?

(Papers were produced.)

By Mr. Shapiro:

Q. I show you a paper which I will ask the stenographer to mark for identification Exhibit 30—

(A booklet entitled "Agreement and declaration of trust, Independence Shares Corporation and the Pennsylvania Company for Insurances on Lives and Granting Annuities, and other agreements affecting Independence Trust Shares," was marked Plaintiffs' Exhibit 30 for Indentification.)

By Mr. Shapiro:

Q. I show you paper marked for identification Exhibit 30 and ask you whether that is the paper you referred to a short time ago as the trust agreement with the Pennsylvania Company?

A. That's' right.

Q. Will you look at the front of that? It is marked in lead pencil, although it says Independence Shares Corporation, it says, "of Delaware." Was that Independence Shares Corporation of Delaware.

A. Yes.

Q. That company has been out of existence since 1935, hasn't it? Did you make a new trust agreement?

[fol. 152] A. We assigned all the rights under the trust agreement in the Independence-Shares Corporation.

Q. Did you make a new trust agreement?

A. No, sir.

Q. Mr. Irwin has handed me a paper dated the 16th of December, 1938; at least, it is a typewritten copy of some agreement with names, your name as a party to it.

A. It is a third supplemental agreement.

Q. A third supplemental agreement?

A. It has not been printed and bound in this yet.

Q. Where are the other two?

A. They are in here (indicating):

Q. This is a bound copy, Exhibit 30 is a printed copy of the first, second, and third agreements?

A. Here is the third agreement (indicating).

Q. Well, the first agreement, and then a supplemental agreement, and then a second supplemental agreement, and then a third supplemental agreement, is that right?

A. That is right ..

Q. And the third supplemental agreement is that typewritten paper which we will ask be marked Exhibit 31 for Identification. (Third supplemental agreement dated the 16th day of December, 1938, between Independence Shares Corporation and the Pennsylvania Company was marked Plaintiffs' Exhibit 31 for Identification.)

By Mr. Shapiro:

Q. Is that the agreement that was drawn on the 16th of December, 1938?

A. Yes.

Q. I suppose you notified the investors about the supplemental agreement?

A. Yes.

- Q: Have you got a copy of the printed notice you sent them?
- A. I don't know whether it is here or not.

 [fol. 153] Q. Can it be produced! How did you notify them? By printed notice, or what? I am talking about this very supplemental agreement.

A. It was embodied in dur new prospectus that was

mailed out.

Q. After it was done?

A. Yes.

Q. I am talking about before you did it.

A. No.

Q. You didn't notify them?

A. No.

Q. What were the supplemental changes which were made?

A. Briefly, the supplemental changes were the extension of the termination date of the trust from 1950 to 1970.

Q. A termination of the trust with the Pennsylvania Com-

pany in 1970; what else?

A. The change in the method of compensating the Trustee's fees for this six months' period.

Q. What was that change?

A. The change, we covered that on Monday, if I have to go over it again.

Q. As long as you say you have covered it, I will look it up

in the testimony. What other change?

A. The change waiving our right to receive interest on the distribution account from the Trustee, which was previously—

Q. You mean commission?

A. Interest.

Q. Oh, interest; the trustee paid interest on the account?

A. That is right.

Q. And who got it? Whose right was waived? Who got the money, the interest?

A. There was no right to receive interest.

Q. Who received it?

A. Trust shareholders in their distribution.

[fol. 154] Q. The investors?

A. Yes.

Q. I mean plainly the Independence Shares Trust, that corporation didn't receive it, did it?

A. No.

Q. Or didn't keep it, anyway; what other things?

A. They are the principal changes.

Q. How about this 9 per cent overwrite? Was that changed in any way?

A. No.

Q. When was that change to 61/2 per cent made?

A. It, was never made.

Q. I understood originally you charged a 9 per cent overwrite?

A. That is correct, in connection with Capital Savings

Plan certificates. We also covered that, I thought.

Q. What you meant last week was that up until the time as long as you were selling Capital Savings certificates there was that overwrite charge of 9 per cent?

A) Up until May 2d, 1938.

Q. And then you stopped selling Capital Savings Plan certificates and sold what?

A. Independence Trust Shares Purchase Plans. It is en-

tirely different.

Q. You mean in that case you don't charge the 9 per cent, but you charge sixty-five cents a month?

A. That is correct. We also made a reduction in the over-

write from 9 per cent to 71/2 per cent as of May 2, 1938.

Q. Isn't it correct that was because, first, what you did under Capital Savings Plan was you had a sponsor in the proposition; who was the sponsor?

A. Capital Savings Plan, Inc.

Q. And they sponsored an issue of what?

A. Capital Savings Plan contract certificates.

Q. From whom?

A. From whom?

[fol. 155] Q. Yes, weren't there two companies which got this 9 per cent 1.

A. That is right.

Q. Who was the other company?

A. Independence Shares Corporation.

Q. So, what happened was that Capital Savings Plan sponsored the Independence Shares Corporation proposition, and when the 9 per cent overhead was paid, 7½ per cent went to Capital Savings Plan and 1½ per cent to the other Independence Shares Corporation?

A. I will only admit the allocation of the 9 per cent was prior to May 2, 1938; 1½ per cent to Independence Shares Corporation and 7½ per cent to Capital Savings Plan, Inc.

Q. Will you tell me why the Independence Shares got 1½ per cent and why Capital Savings Plan got 7½ per cent? And then we wilkget the answer that way.

A. One and one-half per cent was calculated to cover the cost of operating the Independence Shares Corporation on a most economical basis possible.

Q. Independence Shares Corporation?

A. Yes.

Q. Why did you have to operate that? What were they needed for in this practice?

A. They were needed to create the trust shares. .

Q. You are creating the same trust shares now, aren't you?

A. Yes.

Q. Without the two corporations?

A. That is right.

Q. Why did you need them before?

A. Because Capital Savings Plan didn't have a right to create them under the trust agreement:

Q. Under what trust agreement?

A. Under the last exhibit here.

Q. This agreement between you and the Pennsylvania Company?

[fol. 156] A. Yes.

Q. What was to stop them from giving the right? You are doing it now, aren't you? What I want to know is why you should give these people 1½ per cent for doing nothing, that is what I want to know.

Mr. Irwin: I object to that question as being highly improper.

Mr. Shapiro: I believe the question is proper, and repeat it.

The Court: I think the question is all right.

By Mr. Shapiro:

Q. Why did you charge 1½ per cent when you say it was for nothing? It has a consideration.

Mr. Irwin: He hasn't said it was for nothing. The Witness: There is a cost of doing business.

By Mr. Shapiro:

Q. What I want to know is why you needed it to do this business under this arrangement? Why did the Independence Shares Corporation have to be injected in this picture at all?

A. The Independence Shares Corporation was the basic

picture to begin with.

Q. Why did you need the Capital Savings Plan, Inc.? So my question is perfectly clear—

Mr. Irwin: May I ask Mr. Shapiro to give the witness an

opportunity to answer the question?

The Court: I would just hate to be on the witness stand with the two of you.

By Mr. Shapiro:

Q. I want you to understand what I am driving at. Tell the Court what was the purpose, why you needed that sec[fol. 157] ond company? You explain those functions, if you will, of the two companies; that will probably help us.

A. I think it would help a lot.

Q. Go ahead, explain it.

A. Independence Trust Shares is an investment trust of the semi-fixed type. It was in existence prior to the formation of Capital Savings Plan. It was sold and distributed through dealers, E. H. Rollins and Jones, Janney and Company, and others. It was distributed all over the United States, California, New York, out through the middle west, Pennsylvania and the Eastern Seaboard.

Capital Holdings Plan was formed in order to give investors the opportunity to buy Independence Trust Shares on a monthly basis and have those shares held for them by a bank, for the bank to reinvest the semi-annual dis-

tribution, and as the investor made payments the investor's account was credited with Independence. Trust Shares which through the machinery of the Trustee was carried out to the fifth decimal point, which meant that all funds

for investment were fully invested.

When you are dealing in a two dollar—as a matter of fact, in the early days the price was a good deal higher—when you are dealing with a higher priced stock, let us take the price of \$4, to buy with a \$10 payment other than two shares was not possible. Under this plan that was gotten out with the Pennsylvania Company it was possible to have that money fully invested after, of course, the allocation for the payments and fees that were called for.

Those plans called for payments of \$1200 over a period of ten years, and they also gave the investor the right to withdraw his trust shares at any time during the length of the plan, or he could terminate the plan whenever he wanted. It was his property, not ours. We merely built up and offered him a convenient method of acquiring these

shares over a period of years.

Q. You haven't yet answered my question, Mr. Geary. What was the difference between the functions of the two companies?

[fol. 158] A. Two of them.

The Court: I think he did.

The Witness: The Court understands.

The Court: In other words, the Capital Savings Plan was to enable the persons to participate in the plan or contract of the Independence Trust Shares when they were subscribing on the monthly basis.

Mr. Shapiro: If that is what he said, I am willing to ac-

cept it, if your Honor so understands.

By Mr. Shapiro:

Q. Who charged the 71/2 per cent?

A. Who got the 71/2 per cent?

Q. Which company got the 7½ per cent?

A. Capital Savings Plan, Inc.

Q. And they are the ones that made possible this other plan by sponsoring it, is that what you mean? The Capital Savings Plan is the one that sponsored the sale of the Independence Trust Shares?

A. Sponsored the sales of Capital Savings Plan con-

tract certificates.

Q. Those contract certificates gave them the right to acquire Independence Trust Shares, is that right?

A. Let me put it this way, maybe this will clear your mind

on the subject:

Prior to our purchase of the Independence Shares Corporation a dealer commission of 6 per cent was given us in connection with the Independence Trust Shares that we sold.

By the Court's

Q. When you say you sold Independence Trust Shares, what did you sell? How did you sell them? Was that on a monthly basis?

A. We sold them entirely through the Capital Savings

Plan.

[fol. 159] Q. When they took this company over there was a Capital Savings Plan.

A. We didn't own the Independence Shares Corpora-

tion until 1932, your Honor.

Q. What I want to the to get is the difference in the operation of the two plans. We are talking a lot about these two plans and have never described them very clearly. The Independence Trust Shares Plan, you say, was operated by Rollins?

A. The Independence Trust Shares, themselves, were sold by investment dealers, they were sold in lump sums

to investors of \$1000, \$2000 and \$10,000.

Q. You put up the investor's \$1000 and got a variety or a diversity for the investor?

A. Yes.

Q. Along comes Capital Savings Plan to enable the people to buy that on the installment basis?

A. Yes.

Q. You charged 9 per cent, $7\frac{1}{2}$ per cent went to Capital Savings Plan and $1\frac{1}{2}$ per cent to Independence, because Independence had some overhead?

A. Yes, but I want-

Q. I am trying to find out from you.

A. Yes. I would like to point out to you that prior to the time we took over and maintained Independence Shares Corporation. Independence Shares Corporation were retaining 3 per cent and paying Capital Savings Plan 6 per cent of the 9; they kept 3 and paid out 6. When we

took over Independence Shares Corporation we paid ourselves no salary and we broke the thing down to the most economical operating unit, and in that way we kept 1½ per cent in Independence Shares and paid ourselves in Capital Savings Plan 7½ per cent. In other words, the purpose was to have the Independence Shares Corporation cover its cost of doing business only through the 1½ per cent.

By Mr. Shapiro:

Q, Who got the benefit of the \$60 charge made? Capital Savings Plan or Independence Trust Shares? [fol. 160] A. Capital Savings Plan.

Q. Capital Savings Plan?

A. That's right.

Q. The paper which you read from and which was marked Plaintiffs' Exhibit C-2 refers to an agreement—rather, you said is the notice of the agreement which is contained in the exhibit marked for identification No. 30. It is, I assume, because these stocks that you sold became impaired that you decided not to retain them, is that right?

A. We sold them entirely upon the recommendation of

investment counsel who was supervising the portfolio.

Q. I am not asking you whether it was on the advice of investment counsel.

Mr. Irwin: I submit that that answer was responsive.

By Mr. Shapiro:

Q. Did you sell them or did investment counsel sell them?

A. They were sold, as I testified on Monday, through regular brokers on order from the Pennsylvania Company instructed by us.

Q. Why did you sell them?

A. On the advice and recommendation of investment counsel.

Q. By what authority?

A. By the authority of that—where is it?

Q. This trust agreement?

A. Yes.

Q. Then I repeat it was the provision of the trust agreement which you pointed to as being advertised in this Exhibit C-2, which says that the trust agreement provides that should the depositor conclude that the stock of any company in the portfolio may or will become substantially

impaired in value, the depositor may instruct the trustee to sell such stock?

A. That is right.

Q. It was because of that?

[fol. 161] A. Yes.

Q. Was it your opinion that the stock had become impaired?

A. Yes.

Q. To what extent? Who else made an examination?

A. It may become impaired.

Q. I asked you whether in your opinion it had become impaired, and you said yes. Have you got a Board action on that?

A. Yes.

Q. Have you got the minutes?

A. Yes.

Q. Will you produce them, please?

A. Yes.

Q. I noticed in your minutes that you referred to the fact these stocks might be impaired, and, therefore, you sold them.

Mr. Irwin: He didn't sell them.

Mr. Shapiro: If your Honor pleases, may I proceed with my question?

The Court: I want Mr. Irwin not to do it.

By Mr. Shapiro:

Q. I want to direct your attention to the prospectus issued by your company on January 3, 1939, in which you list stock of the Philadelphia National Bank on page 19. I understand there you say that these securities were valued by the management of the depositor at the date of deposit in the sum of \$160,000. I am not reading the other figures, I am using round figures. \$160,000, and that on August 31, 1938, they were worth \$165,000. What was there about that stock that so impaired its value that you should sell it?

A. I am not talking about impaired values; we are

talking about future impairment of values. .

[fol. 162] Q. Future impairment of values. Now, wait, I don't think that I should ask that question, although it is a very important question; it might be misunderstood.

Isn't it true that when you sold this Philadelphia National Bank stock even in 1939 you received more than the price on August 31, 1938?

A. That is correct.

Q. Is that right?

A. That is correct.

Q. Why did you sell that stock?

A. We sold it on the recommendation of investment counsel, Mr. Porteous, in the court room, sir, if you care to have him testify.

Q. Is there anything in your contract or trust agreement that gives you the right to sell on the advice of somebody else? Is there?

A. Is there anything in our-

Q. Is there anything in your contract?

Mr. Irwin: What contract?

By Mr. Shapiro:

Q. That gives you the right to sell this stock on the advice of somebody else other than the board, or your own action?

Mr. Irwin: If your Honor pleases, I object to that question. I think Mr. Shapiro should designate what contract he is talking about.

The Court: Specify it. You mean the contract holder

of the Plan or the contract with the trustee?

Mr. Shapiro: Doesn't that answer itself? How would I be interested in the

The Court: You make him very unhappy by the form of your question.

By Mr. Shapiro:

Q. Do you understand who I mean? Did the contract buyer or investor, whatever you call him, the man who paid [fol. 163] \$10 a month to your company, or \$5—what is there in the contract with him that gives you the right to sell this stock on the advice of somebody else, some investment counsel? Will you point it out to me?

A. The right is not in the contract, but it is vested in our company through the Independence Trust Shares trust

agreement.

The Court: Haven't we gone into that? We have gone into it.

Mr. Shapiro: I am not going into that contract.

The Court: I know, but we have gone into the question as to whether the plan holder—

Mr. Irwin: Where is it there?:

The Court: Mr. Irwin, I want to curtail this examination, not lengthen it. There is some testimony on the subject. Exhibit C-2 has something in it.

Mr. Shapiro: If your Honor pleases, this is an entirely different question. They said they had a right to sell on impairment. He said they sold upon advice of investment counsel. Is there anything in the contract that gives them the right to sell on advice—investment counsellor's advice?

The Court: I don't think that is material, I don't think it is important as to why they made up their minds to do it. I don't see where that is relevant at all. It wouldn't justify a mistake, if they made a mistake, because they had been advised by investment counsel.

Mr. Shapiro: Would you mean to say if it hadn't authorized changing the stock they could change it?

The Court: No, that is apart from the thing. It is not a question of whether they were authorized to sell. You said was there anything in the prospectus, or any notice given that they could sell on the advice of investment counsel.

[fol. 164] Mr. Shapiro: Yes, if it were in the contract they had the right to do it.

The Court: If they had the right under the terms of their arrangement and notice were given, it doesn't make any difference whether they got advice from investment counsel.

Mr. Shapiro: There is nothing in the contract, itself, as to the right to sell under impairment. I want to know if there is anything that gives them the right to sell under the advice of investment counsel. There are about fifty contracts here; they know more about them than I do, certainly.

By the Court:

Q. Answer the question.

A. The right is vested in our company through the Independence Trust Shares trust agreement.

By Mr. Shapiro:

Q. Is there anything in the contract with the investor that refers to your right to do that?

A. The investor buys Independence Trust shares which are issued under this declaration of trust.

Q. Mr. Witness-

A. That answers the question.

Q. You can answer my question. I am asking you, you would know, you have handled these contracts. Is there anything in the contract that gives you the right to sell upon. the advice of investment counsel? Can you answer that, yes_or no?

Mr. Irwin: No.

Mr. Shapiro: If the Court please

Mr. Irwin: Why aren't you fair with your questions?

Mr. Shapiro: If the Court please, either your Honor will have to say something to this gentleman, and I am doing [fol. 165] him a favor by calling him a gentleman-or I will have to forget myself; which I am trying not to do.

The Court: If we can't proceed in an orderly way, I will continue this matter for one week. There won't be any . further statements made. At the next interruption you will address any question to the Court. I understand your zeal in your client's behalf, but we must try this in an orderly fashion. As I see it, I think you are provoking Mr. Shapiro into the use of adjectives that cause further protest on your part, and it won't do any good in the situation at all.

I am just as anxious as you are and anyone could be lest any false notion get abroad by reason of any question asked by the parties in this case. I don't think it will help the situation-I don't like to use the phrase-by inciting Mr.

Shapiro's anger or resentment.

Mr. Shapiro: That is all he is inciting, resentment, not anger.

By Mr. Shapiro:

Q. Can you answer the question?

A. The contract, the Capital Savings contract plan certificate calls for the investment of the funds less certain deductions, in Independence Trust shares. In the Independence Trust Shares trust agreement is vested the right of the directors of the Independence Shares Corporation

to make eliminations under certain conditions, all of which I read this morning.

Q. That is your answer?

A. Yes.

Mr. Shapiro: I won't press it any further, your Honor.

[fol. 166] C. LAMPE.

Direct examination.

By Mr. Shapiro:

Q. Now Mr. Lampe, where do you live?

A. Radnor.

Q. What is your business?

A. Chauffeur.

Q. Did you make any investment with the Independence Shares Corporation, or the Capital—

A. Capital Savings.

Q. Capital Savings; when? When was it?

A. Two and a half years ago.

Q. Two and a half years ago?

A. Or three years. . .

·Q. How much did you pay per month?

Mr. Irwin: If your Honor please, unless there is some connection—

The witness: \$10 a month.

Mr. Irwin:—pardon me, sir, just a moment. Unless there is some connection between this man and the plaintiffs in this case, I certainly don't think that his testimony is relevant.

The Court: Why? You don't know what it is.

Mr. Irwin: Because there is no averment in this bill except as to these particular plaintiffs.

The Court: It is a class bill, as I take it.

Mr. Irwin: If your Honor please, it is the law I can't come in and sue a corporation unless we have a common interest. If your Honor please, each individual who holds a plan is the owner through the Pennsylvania Company of certain trust shares.

The Court: We have gone over that. I will overrule your objection and grant you an exception for the record.

Mr. Irwin: Very well, sir. I won't repeat my objection, sir, because it will apply to his testimony.

[fol. 167] By Mr. Shapiro:

- Q. You said \$10 a month?
- A. Yes, sir.
- Q. Are you still paying?
- A. No, sir.
- Q. When did you stop paying?
- A. About eight months ago,
- Q. Who was the salesman who sold it to you?
- A. Mrs. Balanos.
- Q. Mr. or Mrs.?
- A. Mrs.
- Q. Did you come to see her, or did she come to see you?
- A. She came to see me.
- Q. Tell the Court what she told you about this when she was selling it to you.
 - A. That it was a savings plan.

By the Court:

- Q. Which plan was this? Was this the Capital Savings?
- A. Capital Savings.

By Mr. Shapiro:

- Q. Tell us what you had to do, what you had to pay, and what you would get:
- A. Pay in a certain amount of money and you get so much money in certain years.
- Q. All right. How much did she tell you you had to pay in and in how many years did she tell you you would get your money?
 - A. You would get it in ten years.
- Q. What would you get in ten years if you paid \$10 a month?
- A. About a thousand to eleven hundred dollars for six hundred.
- Q. For six hundred dollars you would get a thousand to eleven hundred?
 - A. Yes.
- [fol. 168] Q. You were paying on the basis of \$10 a month?
 - A. Yes, my wife and I both had.
 - Q. Oh, you each took five?
 - A. Yes, we each took five.
 - Q. I am sorry:

By the Court:

- Q. Would that be \$1000 to \$1100 each you were to get, or the two of you together?
 - A. Yes.
 - Q. Each would get \$1000?

By Mr. Shapiro:

- Q. Each would get \$1000?
- A. Yes.
- Q. How many years did you say you had to pay?
- A. About ten years.
- Q. What else did she tell you went along with that? What else would you get if you continued to pay that money?
 - A. Insurance.
 - Q. What was the insurance, did she tell you?
 - A. If you died in a certain time or got killed, you got, I think it was, \$1000 insurance accidental death, something like that.
 - Q. Did you ever know, or did anybody ever tell you, that money was being invested in stocks?
 - A. Not at first.

Mr. Irwin: If your Honor please, I object to that as a leading question.

The Court: I will sustain the objection.

The Witness: Not at first.

Mr. Irwin: I ask it be stricken out.

The Court: Strike out the answer.

[fol. 169] By Mr. Shapiro:

- Q. When you stopped paying eight months ago, what happened? Did you go to see anybody?
 - A. Yes, I went to the office.
- Q. Whom did you see there? When you say, "the office," you mean what? Capital or the Independence Trust?
 - A. Capital Savings.
 - Q. Yes.
 - A. At the Commercial Trust Building.
 - Q. Whom did you see?
 - A. I can't recall who I seen down there, but—
- Q. Is the person in court that you saw? Do you see them here in court?

A. No, I don't think so; I don't remember.

Q. You don't know the name?

A. No.

Q. Is that the only conversation you ever had with them? Is that the only time you went back?

A. Yes.

Q. Have you got any of your money back?

A. Yes, I got some money back.

Q. How much did you get back?

A. About \$36.

Q. Did you get any papers

By the Court:

Q. How much did you pay in?

A. About \$125.

Q. \$125?

A. Yes, sir.

Q. You got back \$36?

A. Yes.

By Mr. Shapiro:

Q. Both of you together paid in \$125, or each?

A. No, both.

Q. You got back how much?

A. About \$36.

[fol. 170] By the Court:

Q. Each, or together?

A. Together.

By Mr. Shapiro:

Q. About \$18 each?

A. Yes.

Q. I show you a paper marked for identification Exhibit C-13 and ask you whether you got that; did you ever get a book like this from them?

A. Yes, sir.

Q. Look at it. What did you do with that book?

Mr. Irwin: May I see that book?

Mr. Shapiro: You have seen it before. It is Exhibit C-13.

Mr. Irwin: I haven't looked at it.

The Witness: They took that book from me.

By Mr. Shapiro:

Q. Who took it from you?

A. The office.

Q. When you got this \$36, did you get a paper or certificate of any kind?

A. I had to turn that back.

Q. You turned everything back and you got \$36 for it?

A. Yes, sir.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me a minute while

I speak to Mrs. Balanos?

I won't be able to speak to her. If your Honor please, I move to strike out this witness' testimony as irrelevant and immaterial, not showing any connection whatsoever with the company or its officers.

The Court: Motion denied, exception.

[fol. 171] Cross-examination.

By Mr. Irwin:

- Q. Mr. Lampe, was this plan that you took out in your name?
 - A. In both names.
 - Q. You had insurance with it, did you?

A. Yes, I did.

Q. And, so, a portion of the money that you paid in was deducted for the payment of the insurance, is that right? You had a life insurance policy, didn't you, with your plan?

A. Yes, that was connected with it.

Q. And you knew that part of the money you paid in would be deducted to pay the premium on that life insurance policy?

A. No, I didn't know nothing about that.

Q. You know if you have life insurance you ordinarily pay a premium?

Mr. Shapiro: I object to that.

The Witness: Oh, yes.

Mr. Shapiro: We are not going into the question of life insurance.

The Court: I will overrule your objection. Mr. Shapiro: I don't want an exception.

The Court: Answer the question.

By Mr. Irwin:

Q. You know if you take out a life insurance policy you pay a premium on it, don't you?

A. Yes.

Q. And you knew that you had a life insurance policy in connection with your plan, didn't you?

A. Yes, sir.

- Q. And you knew that part of what you paid in would be deducted to pay that premium, didn't you? [fol. 172]. A. That wasn't explained to me that way.
- Q. I know, but you knew enough from your own knowledge of life insurance and the fact that you had to pay premiums for them—

A. I know.

Q. And you knew that if you got life insurance here you would have to pay a premium upon it, didn't you?

A. It wasn't explained to me that way.

Q. I say you knew it, didn't you? Mr. Shapiro: I think he answered.

By the Court:

Q. Did you know it or didn't you know it?

A. I knew there was insurance connected with it.

Q. Did you know you were paying for the insurance?

A. No, I was paying \$5 for the Capital Savings.

Mr. Shapiro: I understand the cards for this man are here in court. I should be very glad to offer them in evidence without having seen them. May I call for their production? Will you produce them?

Mr. Irwin: They are right here. Mr. Shapiro: Let us have them.

Mr. Irwin: Of course, I object on the same ground, that this whole thing is irrelevant to this matter, and I ask if your Honor will rule on that and grant me an exception.

The Court: I will overrule your objection and grant you

an exception.

Mr. Shapiro: Without having seen these cards or knowing what they are, I offer them in evidence and ask that they be identified with the subsequent numbers.

Mr. Irwin: Is the witness still here? I have one more

question to ask him.

[fol. 173] Mr. Shapiro: There are two parts, mark each part, 36 and 37.

(A service call report with card attached relating to Mrs. Emily V. Lampe was marked Plaintiffs' Exhibit 36.)

(A service call report with card attached relating to Carl Lampe was marked Plaintiffs' Exhibit 37.)

By Mr. Irwin:

Q. Mr. Lampe, Mrs. Balanos or someone called on you, did they not?

A. Yes.

Q. To ask you whether you understood about this plan?

A. That was later on, that was about a year after.

Q. I ask you on the back of what is marked Exhibit 37 if that is your signature, Carl Lampe?

A. Yeş.

Q. And the witness is Jane T. Balanos; that is Mrs. Balanos whom you referred to?

A. Yes.

Q. Is that a correct statement of what occurred at that interview, and the card that you signed, and it is dated March 4th?

Mr. Shapiro: Let him read it. Read it.

Mr. Irwin: Yes, surely; I want him to have full opportunity to read it.

The Witness: "Any question about the plan? No.

"Any change of address? No. 'Any change of beneficiary? No.

"Are the costs clearly understood? Yes."

At that time I understood them.

By Mr. Irwin:

Q. You understood them then?

A. Yes.

[fol. 174] Q And you signed that card?

A. "Do you understand the value of your contract fluctuates with stock market prices? Yes.

"Are payment notices received promptly? Yes.

"Are monthly bulletins of interest? Yes."

Q. Those are the answers you made at that time, and that is your signature to it?

A. Yes, afterwards.

Mr. Irwin: Very well.

Redirect examination.

By Mr. Shapiro:

Q. How long before you went to get your money back did that happen? What time did it happen? After you got your money back? When did that happen?

A. This was before I got the money back.

Q. How long before?

A. I am not quite certain, but it was a good while before.

Q. Where did you get the new information you say you had there?

Mr. Irwin: If your Honor please, I don't think this is re-direct examination.

The Court: Yes, you brought up something that hadn't been testified to on direct examination.

Mr. Irwin: Certainly, it is not proper for Mr. Shapiro to ask the witness how he knew.

The Court: He is covering the same matter covered by your cross-examination.

By Mr. Shapiro:

Q. You just told Mr. Irwin at that time you knew, but before you didn't know. When did you find out about this stock fluctuation?

[fol. 175] A. Different people told me.

Q. Were those people belonging to the company?

Q. This was after you bought it?

A. Yes.

Mr. Shapiro: That's all. Mr. Irwin: That's all.

Agnes Landon, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Miss Landon, you live at 1402 Spruce Street? A. Yes.

Q. At one time you purchased a contract or certificate from one of these companies?

A. Yes.

Q. I don't know the name; do you know the name?

A. I am not so sure about the name, but I could identify the salesman who came to my place.

Q. Is he here?

A. No.

Q. What is his name?

A. I wouldn't know his name.

Q. How much money did you pay? .

A. \$80.

Mr. Irwin: If Your Honor please, I object to this witness' testimony on the same grounds as I have already, but I further object to this witness' testimony because she says she doesn't know what plan she bought.

The Witness: Oh, yes, I do; Capital Savings Plan.

Mr. Shapiro: I was having some difficulty with that, myself. Thank you.

[fol. 176] Mr. Irwin: If it is a fact, I would just as soon bring it out for you.

Mr. Shapiro: I was trying to without offending the rules of evidence.

By Mr. Shapiro:

Q. To whom did you pay \$80?

A. To the Capital Savings Plan and to the Pennsylvania Company.

Mr. Irwin: Will you grant me an exception? The Court: I will grant you an exception.

By Mr. Shapire:

Q. Did you get one of these little savings books?

A. Yes, sir.

Q. Were you home, or did you go in the office?

A. I was in my home; the salesman came to my home and solicited this plan.

Q. What did they tell you?

A. Told me it was a very good investment, very good savings plan.

Mr. Shapiro: If your Honor pleases, I propose to follow this up by testimony that this company employed salesmen of various numbers and kinds, and authorized them to go out and make these statements. I can't identify each salesman in each case, but I think if I have established the fact that it was the custom of the company to employ these salesmen generally and regularly that I have a right to offer this evidence.

Mr. Irwin: I object to any testimony being offered when

the witness can't identify the salesman.

The Witness: I can identify the salesman, your Honor, if he were here. I am not so sure if his name is Gordon, or not.

[fol. 177] By the Court:

Q. How do you know he was a salesman?

A He told me he was a salesman of Capital Savings Plan.

Q. Did you ever go to the office?

A. No, I did not.

By Mr. Shapiro:

Q. Did you go to the office and make payments?

A. No, sir, I sent them to the Pennsylvania Company on regular stamped envelopes printed for that purpose.

Q. Where did you get those stamped envelopes?

A. They were mailed back to me with the receipted book when I made my payments to the company.

Mr. Shapiro: I repeat the question, then, if your Honor please.

Mr. Irwin: I object.

The Court: At this time I will overrule your objection and grant you an exception subject to the provision that Mr. Shapiro make some identification of the person who made these representations, and that they were authorized to do so.

Mr. Shapiro: Is there a Mr. Gordon in court?

(There was no response.)

By Mr. Shapiro:

- Q. Is he still in the employ of the company, Miss Landon?
- A. I don't know.
- Q. Can you find out?



By the Court:

Q. Where did you get the name of Gordon, Miss Landon? Is that your recollection?

A. That is my recollection.

Q. To the best of your recollection, his name was Gordon?
A. To the best of my recollection the name was Gordon.

[fol. 178] By Mr. Shapiro:

Q. Tell us what he told you?

A. I can't tell you everything he told me, because he talked very nearly an hour, but he did make it very clear to me that the Pennsylvania Company were the trustees for this affair. I was very much impressed by it being the Pennsylvania Company because at that time I had a trustfund there, which I still have, and that was the inducement of my taking these shares, because of the Pennsylvania Company.

Q. What was it he told you about the plan?

A. He told me at the end of ten years after depositing \$1200 with the Capital Savings Fund that I was to get \$2000.

Q. At the end of ten years?

A. At the end of ten years.

By the Court:

Q. Did you deposit it in monthly installments of \$10 each?

A. Monthly installments, less twenty-five cents a month.

By Mr. Shapiro:

Q. What was that for?

A. Supposed to go over to the Pennsylvania Company for them—

By the Court:

Q. Did you actually deposit \$10 a month?

A. Actually, yes, sir.

By Mr. Shapiro:

Q. Did he tell you of any charges made against that \$10? \$10?

A. None whatever except twenty-five cents to be deducted for the Pennsylvania Company as Trustee.

By the Court:

Q. Did he say you were guaranteed to get \$2000?

A. Guaranteed to get \$2000.

[fol. 179] Mr. Irwin: If your Honor please—— The Court: I will grant you an exception.

By Mr. Shapiro:

Q. Did the salesman discuss with you anything about the Pennsylvania Company's relationship, or what they were doing with this plan?

A. No, I knew nothing whatever about that.

Q. You told me because you heard the Pennsylvania

Company was in it-

A. He told me the Pennsylvania Company were trustees for this plan, that it positively could not go wrong because the Pennsylvania Company were backing them up in every way, shape and form.

Q. Did you discuss with him or he with you anything

about building and loan associations?

A. Oh, yes, I asked him if it was something similar to a building and loan. He said they were better than a building and loan because a building and loan sometimes doesn't run out for eleven or twelve years, but this positively would be paid back to me in ten years.

By the Court:

Q. What do you mean?

A. The \$2000 was to be paid to me in ten years.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me for just a minute, sir?

Cross-examination.

By Mr. Irwin:

- Q. When did you take out this plan?
 - A. Three years ago.
- Q. Three years ago!

A. Yes.

Q. How long did you continue it?

A. Eight months.

[fol. 180] Q. You had a prospectus, didn't you?

A. I don't know anything about what a prospectus is.

Q. Did you have insurance?

A. No. He asked me to take insurance, but I told him I had sufficient life insurance.

Mr. Irwin: That's all.

By the Court:

Q. How much money did you put in and how much did you get out?

A. I put in \$80, and I sold it, fortunately, to a personal friend of mine who hasn't gotten anything out of it so far.

Q. Did you get your \$80?

A. Oh, yes, but not from Capital Savings Plan, from a friend of mine.

Redirect examination.

By Mr. Shapiro:

Q. Therefore, you have no interest in this case?

A. None whatever.

Recross-examination.

By Mr. Irwin:

Q. You got all the money you put in?

A. Yes.

Mr. Shapiro: But not from Capital Savings.

The Court: That is understood.

Mr. Irwin: I move to strike out this testimony as intelevant and immaterial.

The Court: I will deny the motion and grant you an exception.

[fol. 181] Anthony Picone, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. What is your business?

A. Shoemaker.

Q. Did you buy some of this Capital Savings Plan?

A. Yes, sir.

- Q. Yourself and your wife, too?
- A: Just myself; my wife is the beneficiary.

Q. She is the beneficiary?

A. Yes.

- Q. How much did you buy? What did you pay in a month?
 - A. I have two of them.

Q. Two?

A. I have one in monthly installments, and another one paid up.

Q. Who sold them to you?

- A. A salesman by the name of John Laird.
- Q. Who was Laird connected with, do you know?

A. I couldn't tell you.

Q. Have you got any papers in this thing?

A. My paper is in the attorney's hands. I have a suit against the company to recover my money.

Q. Who is your attorney?

A. My attorney is Edward McLaughlin, from Chester, and R. K. Scott, from Philadelphia.

Mr. Irwin: If your Honor please, I would like to renew my objection to this witness' testimony on the same ground. Will your Honor grant me an exception?

The Court: I will.

The Witness: The salesman came to me on the Capital Savings Plan.

[fol. 182] By Mr. Shapiro:

Q. The salesman introduced Capital Savings?

A. The salesman introduced Capital Savings, which was a very good company and in good standing, and the fellow was interested in buying a certificate, it would be a good. thing. I explained it to my wife—

The Court: You can't tell us what you said to your wife.

By Mr. Shapiro:

Q. What did he tell you about it?

A. He told me the fellow was interested to buy some of this Capital Savings Plan.

Q. Did you buy it the first time he came, or did you talk

to your wife, first?

A. Not right away, but I told him to come up in my home and talk this thing over with my wife and I would decide to buy one, I bought one.

Q. Before you bought it you went home and talked to

your wife-

A. Oh, no, it wasn't bought yet.

Q. What?

A. It wasn't bought, I didn't buy before I gave him my wife's advice.

Q. You talked to your wife about it first?

A. Yes. He came to see us at the house.

Q. You were there, and your wife was there, and he was there?

A. That's right.

'Q. What did he tell you about this plan, and what did he tell your wife? What did he tell your wife about it while you were there?

A. He told my wife and I, both, if we would buy some of this Capital Savings Plan, he said it was a good buy,

we agreed to pay.

Q. What did he tell you to buy, how much were you going to buy?

[fol. 183] A. I bought one at \$25 monthly installments.

Q. How long were you to pay that?

A. Fifteen months.

Q. Fifteen months?

A. Yes.

Q. What did he say you were to get for it?

A. He told me that this was a ten-year plan; paying \$25 a month I have to pay \$3000 and at the end of ten years I would receive \$5000.

Q. \$5000 for your three?

A. Yes.

Q. What else did you take?

A. Then I took another one all paid up.

Q. Later on?

A. Later on, a month later.

Q. Was your wife there when you took that one?

A. ·Yes.

Q. Was this man there, too?

A. Yes.

Q. What did he tell you about this, what you had to pay and what you would get?

A. He advised me to buy—with the money I had cash he advised me to buy two units. The result was \$2400.

Q. \$2400 in cash?

A. \$2400\in cash, that was two thousand, four hundred dollars, and he told me that this money would grow up, would make\profit fast, and he told me that in two years' time for \$2400 I would receive \$4000.

Q. You could get \$4000 in two years time?

A. Yes.

Q. For that \$2400?

A. Yes.

Q. Where did you make the payments of \$25 a month?

A. In my own home.

Q. Where did you send them, or did somebody come to collect it?

A. I took out a book.

[fol. 184] Q. That is, for the \$2400?

A. Both.

Q. You kept on paying \$25, didn't you?

A. He came to collect monthly.

Q. Every month he would collect?

A. Every month he would collect.

Q. Did he give you a book?

A. Yes.

Q. Is the book the same as the one here?

A. My attorney has all my papers.

Q. C-13, was it like that? Is that the kind of book you got?

A. That's right.

Q. That is correct, is it?

A. Yes.

Q. Did he tell you anything about the Pennsylvania Company?

A. Yes, he told me the Pennsylvania Company was in back of it.

Q. That the Pennsylvania Company was in back of it?

A. Yes.

Q. Did you know who they were, the Pennsylvania Company?

A. Well, I heard about it, it was a bank of great reputa-

By the Court:

Q. Did you put up \$2400?

A. All paid up at once.

Q. \$2400?

A. And one \$25 a month installment plan.

By Mr. Shapiro:

Q. How long did you continue to pay the \$25 a month, how long?

A. Fifteen months.

Q. You haven't paid it now, you stopped paying?

A. I stopped payment, I find out

Mr. Irwin: Now-

[fol. 185] By Mr. Shapiro:

Q. You stopped payment; what did he say to you about this money being invested in stocks?

Mr. Irwin: If your Honor please, I must object; that is a leading question.

The Court: Sustained.

By Mr. Shapiro:

Q. Did he tell you about your money being invested in stocks?

A. I never knew anything about stocks.

Mr. Irwin: If your Honor please, I object.

The Court: I sustain the objection. The answer will be stricken out.

Mr. Shapiro: That is all, cross-examine.

Mr. Irwin: I have no questions. If your Honor please, may I renew my motion?

The Court: Yes.

GRACE PICONE, having been duly sworn, was examined and testified as follows:

Direct examination.

By the Court: :

Q. I don't believe we have your husband's address. Where do you live?

A. Garrett Avenue, Garrett Hill.

By Mr. Shapiro:

. Q Mrs. Picone, your husband testified that he wouldn't buy unless he talked to you, or unless you were there.

Mr. Irwin: My objection, sir, goes to this witness' testimony.

[fol. 186] By Mr. Shapiro:

Q. So, will you tell us what happened? Will you tell us what happened between the salesman and your husband while you were there, what you said, what you paid him, if anything?

A. What he said to me? In fact, he spoke to both of us.

Q. That's right.

A. I have the same statements to make Mr. Picone made.

Q. You tell us.

A. He said the Pennsylvania Company was in back of it, and also if we paid \$2400 in full we could collect in two years' time, we would collect \$4000.

Q. What about this \$25 a month plan, what was said about that? How long were you to pay, and what were you

to get when you got through?

A. \$25 a month for ten years, and if we paid it regular, at the end of ten years we would receive \$5000.

Mr. Shapiro: Cross-examine.

Mr. Irwin: No questions.

By the Court: ...

Q. Did he tell you anything about the operation of this plan?

A. No, he didn't.

Q. Did he just say to you, put up \$2400 and you will get \$4000 in two years?

A. No, he really did explain. He said if we paid that in, the company does such wonderful business and being the Pennsylvania Company was in back of it we could trust our money into that company and—well, that is just what he said.

Q. He said they did such wonderful business?

A. Yes.

Q. Did he describe the business?

A. No, he did not.

[fol. 187] Q. Did he give you any idea of what was done with your money after the company took it?

A. No. He told us with this savings plan we could with-

draw it at any time and-

Q. Withdraw it on what basis?

A. He told us about the one paid in full, we could withdraw that at any time we wanted.

Q. And get paid in full, did you say?

A. Yes.

J. FITCH, direct examination.

By Mr. Shapiro:

Q. Do you understand my question?
A. No. Will you please repeat it?

Q. After you had gone to the bank and talked to the officer you said you then went home and talked to your mother. Did you go back and talk to anyone of the Capital Savings Plan, Inc., or Independence Trust Shares?

A. No, I didn't.

Q. You just went to a lawyer?

A. Yes, I was very disgusted.

Q. Now, then-

Mr. Irwin: If your Honor please-

Mr. Shapiro: We will take out the disgust.

The Court: Strike it out.

By Mr. Shapiro:

Q. Now, tell me what the salesman told you when he sold you this plan?

10-17 & 18

A. The salesman told me that the Pennsylvania Company was in charge of the money and they were backing the money up.

By the Court:

Q. Which salesman told you that?

A. Mr. Bill Dorsey. .

[fol. 188] Q. By the way, when did this transaction take place when you first subscribed to this plan?

A. About a year and a half ago.

Q. That would be the latter part of 1937?

A. Yes, I think it was.

Q. In the fall of 1937?

A. Yes, I think it was.

By Mr. Shapiro:

Q. What else did he tell you?

A. And he told me that it was a safe investment and I didn't have to worry, and that if I didn't want to save after two years I could get my money, and if I did change my mind about it, I could get my money, but he said before two years I wouldn't be able to get the full amount, but after two years I would.

Q. Then what else did he tell you about it?

A. I can't remember everything.

Q. Did you buy a contract with or without insurance?

A. I bought a contract with insurance.

Q. What did he tell you about that?

A. But he didn't tell me anything about paying the insurance; I mean I didn't understand anything about that. I thought the policy enabled you to be insured.

Q. Not what you thought; what was it he told you about

the insurance?...

A. He told me I was insured by the company, but he didn't mention anything about buying his policy.

Q. For how much were you insured?

A. For \$600, I believe.
Q. Did you ever get an insurance policy?

A. N., I don't believe I did.

Q. Did you ever find out from him who was to get this insurance money?

A. No

The Court: What is the question?

By Mr. Shapiro:

Q. Did you ever find out who was getting the insurance money, or did Mr. Dorsey tell you who was to get the insurance money?

Mr. Irwin: May I object to that as being a leading question?

The Court: I will sustain the objection.

Mr. Shapiro: Will you grant me an exception? The Court: Yes, it is leading, Mr. Shapiro.

By Mr. Shapiro:

Q: What did Mr. Dorsey tell you with respect to when you would get all of your money, or how long you would have to continue to pay?

Mr. Irwin: If your Honor please, I object to that question. The witness has already covered it. It is leading.

The Court: She testified she was told by Dorsey if she paid \$5 a month for ten years she would get \$1000, and at the end of two years she would get all her money back if she wanted it, and that prior to two years she wouldn't get all her money back. I have it on my notes here, Mr. Shapiro. If you want it, the stenographer will read it.

Mr. Shapiro: All right, cross-examine, if your Honor has

that recollection-may I ask one other question?

By Mr. Shapiro:

Q. Who was the beneficiary under the insurance policy?
A. My mother.

Mr. Shapiro: Cross-examine.

[fol. 190] Cross-examination.

By Mr. Irwin:

Q. Miss Fitch, the attorney that you went to was Isidor Ostroff, is that correct?

A. Yes, sir, that is correct.

Q. Did you know that he was the person who signed this bill of complaint?

A. May. I see it, please?

Q. This is not his signature.

Mr. Irwin: Is the original here, Mr. Ludwig?

(Papers were produced.)

By Mr. Irwin:

Q. I show you a copy, Miss Fitch, of the original bill filed in this case, and ask you if that is Isidor Ostroff's signature?

A. I don't know whether this is Isidor Ostroff's signature, I only saw it once.

The Court: It is admitted by Mr. Shapiro.

Mr. Shapiro: No question about it.

By Mr. Irwin:

- Q. Did Mr. Ostroff ask you to come in as a witness in this case?
- A. No, Mr. Ostroff did not ask me to come in as a witness in this case.
 - Q. Who did?
 - A. Mr. Winer.
 - O. And who is Mr. Winer? What is his full name?
 - A. Elliott M. Winer.
 - Q. Where does he live?
 - A. He is right here in court.
 - Q. He is right here in court?
 - A. Yes.
- Q. Do you know whether he is connected with Mr. Ostroff? [fol. 191] A. I don't know anything about that.
 - Q. Do you know what his occupation is?
 - A. Yes, he is an attorney.
 - Q. He is an attorney?
 - A. Yes.
- Q. As a matter of fact, you went to Mr. Winer first, didn't
 - A. Yes, I did.
- Q. And Mr. Winer said that Mr. Ostroff was going to handle this case of yours, isn't that right?
 - A. Yes, that's right.

Q. So that at the request of Mr. Winer, who was your attorney, you went to Mr. Ostroff, and Mr. Winer is the person who asked you to come in and testify today, isn't it? A. Yes.

Mr. Shapiro: So did I. That's all. I move to strike out all the answers of this witness under cross-examination as immaterial and irrelevant, and not proper cross-examination. That is a matter of defense.

The Court: I can't understand the relevancy at all.

Mr. Irwin: If your Honor please, this witness comes in and testifies as to certain facts. It is certainly perfectly proper to show whether she has any interest, or whether those through whom she came in here had any interest in this case, and she was represented by Mr. Ostroff, and Mr. Ostroff signed this bill. Mr. Winer told her to go to Mr. Ostroff, and I certainly think it is perfectly proper cross-examination.

The Witness: I was represented by both attorneys.

Mr. Shapiro: That is all right.

The Court: I will grant your motion to strike out, and grant you an exception.

[fol. 192] Mr. Shapiro: By the way.

Mr. Irwin: May I ask that a record of this cross-examination be kept and put in the record?

The Court: It has to be put in the record.

Redirect examination.

By Mr. Shapiro:

Q. Have you settled your claim with the company

A. Yes, I have.

Q. You got a certain amount of money?

A. Yes.

Q: How much was it?

- A. They returned most all the money, with the exception of \$4 they took, off for the insurance, I believe.
 - Q. Then you have no interest in the case, now?

A. No, I have no interest in the case.

By the Court:

Q. What was the \$4 they took off?

A For insurance.

Q. You paid in, as I understand, \$607

A. Yes.

Q. And you got back \$56 from the company?

A. Yes, the company paid back \$56 to the attorneys.

Mr. Shapiro: That's all, thank you.

The Court: It is of interest to the Court to know why this young lady got back her money, why that was done.

Mr. Irwin: Very well, sir, I will tell your Honor.

Mr. Shapiro: Just a minute, wait. May I respectfully object to your Honor's question unless it is made a matter of record?

The Court: I am perfectly willing to have it made a matter of record.

[fol. 193] Mr. Shapiro: I don't want the testimony of Mr. Irwin if it is to be a matter of record. It is my case.

The Court: I don't know whether this would constitute preferential treatment on the part of one plan holder.

Mr. Shapiro: There isn't any doubt about it, and we are ready to show that.

The Court: I will take the matter up later.

Mr. Irwin: If your Honor please-

The Court: I am going to inquire into it further.

Mr. Irwin: Very well, sir, and you won't develop any prejudged idea as to whether a preference was obtained by it?

The Court: Mr. Irwin, don't be so concerned about my mental reactions.

Mr. Irwin: That is all I ask.

LAURA BURDETTE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Where do you live?

A. I live in Radner Way, Radner, Pennsylvania.

Q. Were you at any time employed by the Capital Savings Plan, Inc., or the Independence Shares Corporation?

A. I was employed by Capital Savings Plan.

Q. When?

A. I was employed in the year of 1936.

Q. What was your employment? What were your duties?

A. I was a salesman for the Capital Savings Rlan.

[fol. 194] Q. Salesman?

A. Yes.

Q. What were you selling?

A. Capital Savings Plan.

Q. To whom?

A. To go out and sell it to other people, anybody that wanted to buy it.

Q. Did you sell?

A. I did, sir.

Q. What did you tell these people when you were selling that this plan was?

A. I told them this plan was-

Mr. Irwin: If your Honor pleases, may I object to any testimony of this witness?

Mr. Shapiro: Let me withdraw that question a minute.

By Mr. Shapiro:

Q. Before you began to sell these plans, did you have any conversation with anybody in the company as to what the plan was?

A. Yes, sir, I did. I had a conversation with Mr. Frank

McCown, Jr.

Q. Frank McCown, Jr.; that is before you started to sell?

A. No, that was after I started to sell.

Q. I mean before you started to sell?

A. No, Mrs. Balanos coached me.

Q. What was Mrs. Balanos?

A. She was supposed to be a general agent.

Mr. Irwin; If your Honor please, I ask that be stricken; "she was supposed to be."

The Witness: Well, she was.

Mr. Shapiro: Will you take it subject to proof! I have the contract here.

[fol. 195] The Court: Very often witnesses use the word, "suppose," in expressing themselves.

By the Court:

Q. Do you know what she was?

A. Yes, sir.

Q. What was she?

A. She was a general agent.

The Court: All right.

By Mr. Shapiro:

Q. What did she tell you about this plan?

Mr. Irwin: If your Honor please, I object to anything that Mrs. Balanos said to this witness on the same ground as I have already.

The Court: Objection overruled, exception.

By Mr. Shapiro:

Q. Now, will you answer that question?

A. Well, she told me—first, she came to my house, and she tried to sell it to my mother, and at that time my mother was not interested in it—

Mr. Irwin: If your Honor please, I think that this is certainly irrelevant.

Mr. Shapiro: It is terrible.

The Court: Strike it out.

The Witness: Then at the time I became very much interested in it, myself, and I asked her particulars about it, and she induced me to sell the plan.

By Mr. Shapiro:

Q. What did she tell you about the plan, and what to tell the customers?

A. She told me to go out and tell the customers that this Capital Savings Plan was a very good investment, it was better than a bank, it was better than a building and loan, it was better than anything on the earth, and it had forty-[fol. 196] two of the best companies in the country that were backing it up. The Pennsylvania Company was supposed—was one of the companies, one of the banks that was backing it up, very, very much. I was supposed to emphasize that above everything else.

Q. What did she tell you, if anything, about the payments?

A. A person who wanted to pay \$5-

By the Court:

- Q. You say, "supposed to emphasize"; were you told to emphasize it?
 - A. I was.
- Q. That the Pennsylvania Company was one of the backers?
- A. Yes. I went out and told the people if they wished to put \$5 in a month, that if anything happened to them, they died, or something like that, their people, whoever they would be, would get \$600, and I made \$10 out of that contract. If I sold a ten-dollar contract, I made \$20 out of it, and the beneficiary, whoever it may be, would get \$1200. At the end of ten years I read in this leaflet or prospectus you were supposed to get \$2000.

By Mr. Shapiro:

Q. Instead of using the word "suppose," I want you to 'ell me what you told them.

A. I read in the prospectus they would get \$2000 at the end of ten years.

Mr. Irwin: I object to this witness stating what she read in the prospectus. If she is going to quot from the prospectus, let's show what the prospectus

The Court: The objection is well taken.

By Mr. Shapiro:

Q. You just leave that for a minute, and come to the time you had a conversation with Mrs. Balanos and Mr. McCown, you said.

[fol. 197] A. Yes.

Q. What happened? What was that conversation?

A. Mr. McCown-

Mr. Irwin: If your Honor please, I ask that this witness, if she is referring to this conversation, state as to when and where it took place.

The Witness: I will, sir. It happened to be-

By Mr. Shapiro:

- ·Q. What year and what month?
- *A. 1936.
- Q. What month?

A. In July.

Q. What happened? What was the conversation?

A. And Mr. Mcown, Jr.-

Mr. Irwin: If your Honor please, I would like to have her identify it as to where.

The Witness: In Mrs. Balanos' apartment on the porch.

By the Court:

Q. Where was her apactment?

A. In Radnor Inn, Pennsylvania.

By Mr. Shapiro:

Q. What address?

A. Just Radnor Apartments, Radnor Inn. Mr. McCown appeared there, and then I was introduced to Mr. McCown, and Mr. McCown and Mrs. Balanos were talking about the Capital Savings Plan, what was the best way to sell this plan, and I said to Mr. McCown, "If I have anything to say, it isn't right. I read from this prospectus that the way we sell it at the end of ten years or fourteen years these people will get \$2000, according to what they put in."

He says, "Indeed, that isn't right." He says, "Why, you will never sell anybody if you sell it like that." He says, [fol. 198] "You are not supposed to sell it like that." I

thought at that time-

Q. Not what you thought; what was said.

A. Mr. McCown said, "You don't sell it that way. Tell the people in seven and a half years they are going to get \$2000."

By the Court:

Q. In seven and a half years on a \$10 payment per month?
A. That's right, but that was supposed to mature in seven and a half years.

By Mr. Shapiro:

Q. Did you have any literature in connection with this?

A. When I went to sell the people?

Q. Yes, with this seven and a half year proposition.

A. Yes, I did.

Q. I show you Exhibit C-3.

A. That's right, that is the only-

Mr. Irwin: I would like to see it.

Mr. Shapiro: You have seen it.

The Court: Let him see it again. There are thirty some exhibits.

Mr. Shapiro: I don't have to show counsel an exhibit after I have offered it in evidence each and every time I use it.

The Court: It is one of the courtesies we extend to counsel.

By Mr. Shapiro:

Q. Is this the paper you had with you when talking about the seven and a half year plan?

A. That is correct. This is the only thing I had with me.

Q. That is the only thing?

A. Yes.

[fol. 199] Q. Is there anything on that paper, or was there anything pointed out to you in connection with this seven and a half years?

A. I think this is it right here.

Q. Witness points to yield 21.3 per cent. under heading of seven over the word "years," on the inside of Exhibit C-3. Did you have any further conversation with him on that day?

A. No, I didn't have any further conversation with Mr. McCown. Well, I thought he was vice-president, and I took what he said, and that is the way I sold it thereafter to the people.

Mr. Irwin: May I ask that be stricken out?

Mr. Shapiro: I object to it, sir.

The Court: Why?

Mr. Irwin: Because she said she took what he said. She can't state her conclusions; she can state what happened.

The Court? You know what "I took what he said" means.

Mr. Shapiro: She said she followed it up. She took it and followed it up.

By the Court:

Q. Is that what you mean when you said "I took what he said"?

A. Yes, sir.

By Mr. Shapiro:

Q. Did you sell any contracts?

A. I did. sir.

By the Court:

Q. I would like to understand this clearly. At first you said when you sold these five and ten dollar contracts, at the end of ten years it would yield a thousand dollars in the [fol. 200] case of the five dollar plan, and two thousand dollars in the case of the ten dollar payment?

A. That's right.

Q. Am I correct in understanding you to say that Mr. Mc-Cown told you to emphasize that if \$10 monthly were paid, in seven and a half years there would be a payment of \$2000 to the purchaser?

A. That is right, that is what Mr. McCown emphasized to me to emphasize very strictly before I told them about

anything, to tell them that.

By Mr. Shapiro;

Q. Did you ever see this or a copy of this Exhibit C-24?

A. No.

Q. You have never seen it?

A. I have never seen that.

By the Court:

Q. By the way, Miss Burdette, how old are you?

A. I am twenty-one, your Honor.

By Mr. Shapiro:

Q. How old were you when you were employed as an agent?

A. I was sixteen years old.

Q. 'Did you have a license?

A. No, sir.

The Court: There is something wrong with my mathematics, then, if it was—

The Witness: About seventeen or eighteen then, I think somewheres around there.

: By Mr. Shapiro:

Q. What are the names of some of these people you sold?

A. I sold to Mrs. Ring.

Q. Ring?

A. Yes; and I sold to Mr. Casson.

[fol. 201] Q. Who is he?

A. He is a garbage man that used to come around and pick our garbage up for us.

Q. When did you get your commission?

A. I got my commission as soon as Mr. Casson paid.

Q. What do you mean by that? You got a commission of ten dollars, didn't you?

A. Yes, sir.

Q. When did you get the commission?

A. When he gave me his money, that is when I got the commission. I handed it to Mrs. Balanos, I collected the money. I handed it to Mrs. Balanos, and Mrs. Balanos gave me \$10, because he had a \$5 contract.

Q. She gave you \$10, although he only paid you \$5?

A. That's right.

Q. You started to say your mother wouldn't take one. Did you sell your mother one?

A. I sold my father one.

Q. What did you sell your father?

A. I sold my father the Capital Savings contract.

Q. For how much payment?

A. \$10 a month.

Q. With or without insurance?

A. With insurance.

Q. How many payments did he make?

A. He made about four payments.

Q. To whom?

A. To Mrs. Balancs.

Q. To Mrs. Balanos?

A. Yes, she had my father's book, and she had everything. I took it to her.

·Q. Did you get any of the money back?

A. No, sir. My father died in November, 1936, the 30th.

Q. Did you get a contract for your father?

A. Yes, sir.

Q. Where is it?

[fol. 202] A. I don't have it with me. My mother took the contract, book and certificates, and everything, and gave it to the Pennsylvania Company—

Mr. Irwin: I object. She can't testify what her mother did.

By the Court:

Q. How do you know what your mother did? Mr. Irwin: If your Honor please—

By the Court:

Q. Were you there with her?

A. No, but my sister went down with my mother.

Q. Then you can't tell us.

Mr. Shapiro: Will your Honor take it subject to my proof that the Pennsylvania Company has it?

The Court: Of course, that would be independent oral

testimony.

Mr. Shapiro: Sure. I am satisfied to strike it out. I will subpoena the Pennsylvania Company and have them produce it.

By Mr. Shapiro:

Q. Did you collect the insurance?

A. No, sir.

Q. Did you at any time collect from any of these people an extra charge for insurance?

A. No, sir.

Mr. Irwin: If your Honor please, I object to that as being an extremely leading question.

The Court: I will overrule your objection in this case.

Mr. Irwin: It is a classification of the thing.

The Court: I will overrule your objection and grant you an exception. Will you read the question?

[fol. 203] By Mr. Shapiro:

Q. When I say "extra," I mean over and above the \$10. A. No, sir.

Mr. Irwin: If your Honor please, I object to that, sir.
The Court: I will overrule your objection and grant you

an exception.

By Mr. Shapiro:

Q. What is the answer?

A. No, sir; I never did.

The Court: This woman testified there was insurance in connection with the plan; therefore, she can testify on any and all questions relating to the insurance, or any of the contracts she sold. That is the basis of my ruling. I state that for the record.

Mr. Shapiro: The purpose of my question is to show that there was never any charge paid for insurance; it was in-

cluded in the \$10.

The Court: Let's get along, Mr. Shapiro.

Mr. Shapiro: Will your Honor indulge me just a moment?

By Mr. Shapiro:

Q. Did you have a contract of you

A.°I did, sir.

Q. Did you get your money, or any of it?

A. When I asked to have my contract—when I went in to ask for my money back they sent me \$3. After that I consulted my lawyer, Mr. John J. Gilbride, Market Street National Bank Building, and asked him what I could do.

Mr. Irwin: I object to this.

The Court: I will sustain the objection. You can't tell us what your lawyer told you.

By Mr. Shapiro:

Q. Did you get any money back?

[fol. 204] The Court: She already testified she got \$3.

By Mr. Shapiro:

- Q. I mean in addition to the \$3 did you get any money back?
 - A. Yes, I did. That is what I want to tell you about.

Q. How much?

A. I got the remainder of my \$40 I paid in—my \$30 I put in.

Q. Did you get it yourself, or through counsel?

A. I got it through my counsel.

By the Court:

Q. Did you have a \$10 or a \$5 contract?

A. \$5 contract.

Q. You paid six months

A. Yes.

By Mr. Shapiro:

- Q. Did you get \$3 sent to you by check or cash?
- A. By check.
- Q. Did you get an additional \$27?
- A. Yes, sir.
- Q. By check?
- A. Yes, sir.

By the Court:

- Q. Whose check was it?
- A. Pennsylvania Company.
- Q. When was it you received this check for the \$27?
- A. After I told him I wanted my contract repudiated.
- Q. What year, 1937 or 1938?
- A. 1937, I believe.

Mr. Shapiro: All right.

The Court: Anything else, Mr. Shapiro?

Mr. Shapiro: That is all, sir. I call for the production of the card of Miss Fitch and Miss Burdette if it is here. I am not going to complain if it is not here, but I would like [fol. 205] to have the ledger card or the account card that the company has with these two last witnesses, this witness and the previous witness.

Mr. Irwin: We haven't those, sir; we will get them.

Mr. Shapiro: I will ask that they be produced for the Court.

Mr. Irwin: May I ask your Honor if we may have a five minute recess to get posted on this witness' extensive examination?

The Court: We will recess for five minutes.

(Recess at 10:55 o'clock A. M.)

LAURA BURDETTE, resumed.

The Witness: Your Honor, I would like to make a correction there about Mr. Casson. He wasn't a garbage man.

By the Court:

Q. Will you speak so counsel can hear you?

A. I would like to make a correction about Mr. Casson. He was not a garbage man, but he was going around selling vegetables at people's houses. That is a correction I would like to make.

The Court: That is a correction she would like to make. Mr. Irwin: That is perfectly proper, if your Honor, please. Mr. Shapiro: Cross-examine.

Cross-examination.

By Mr. Irwin:

Q. Miss Burdette, do you know Cosme Balanos?

A. I do.

[fol. 206] Q. How long have you known him?

A. I have known Mr. Balanos as long as I have known. Mrs. Balanos.

Q. How long might that be?

A. Ever since 1935.

Q. Ever since 1935?

A. That's right.

Q. Were you ever employed by Mrs. Balanos? Did you ever do any work at her house?

A. I was employed by Mrs. Balanos to sell Capital Savings Plan.

Q. Did you ever do any work around her house?

A. I did. I helped her when she was having a party, or something like that.

Q. And would you come in there a number of times and help her in that way?

A. I don't know the number of times. Whenever she asked me; that wasn't very much.

Q. That wasn't very much?

A. No.

Q. How often were you at Mrs. Balanos' house in 1936?

A. Oh, I don't remember that.

Mr. Shapiro: I don't know whether we are going into muck-raking or what.

The Court: Come up to side bar and make an offer of

proof.

Mr. Irwin: If your Honor please, I don't think I am required to make an offer of proof on cross-examination.

The Court: I will ask you to make an offer of proof.

(The following transpired at side bar.)

The Court: I won't have any muck-raking here.

Mr. Irwin: If your Honor please, I am not engaged in muck-raking. I am going to show the relationship between

[fol. 207] Mrs. and Mr. Balanos, the fact that they are at swords-points at the present time, that this woman is friendly to Mr. Balanos. I assure you that I have no desire to do anything that is improper.

Mr. Shapiro: I don't object to having an admission on the

record that this lady is friendly to Mr. Balanos.

Mr. Irwin: I can bring that out on cross-examination.

The Court: I wouldn't permit any of the private life of any of the defendants to be brought in.

Mr. Shapiro: Then I will have to go into the relationship with Mr. McCown and this woman which my client told me about. Wouldn't that be nice?

The Court: I wouldn't allow it.

Mr. Shapiro: That is where it leads to.

Mr. Irwin: I can snow interest.

The Court: He isn't a party to the suit.

Mr. Shapiro: He isn't called yet.

Mr. Irwin: He will be called. Mr. Shapiro: How do you know?

The Court: Make an offer of proof and I will rule on it.

Mr. Irwin: If your Honor please, I intend by this examination to show interest and bias of this witness.

The Court: In what way?

Mr. Irwin: If your Honor please, that is my offer of proof on cross-examination.

Mr. Shapiro: I have no objection to showing interest and bias of this witness, but I have an objection to showing in[fol. 208] terest and bias by the testimony that I understand he proposes to offer.

Mr. Irwin: If your Honor please, I don't think I am required to advise my friend—

Mr. Shapiro: I will object to his questions as they develop, if your Honor please.

The Court: All right.

(End of side bar discussion.)

By Mr. Irwin:

Q. How often in 1936 were you at the Balanos home?

A. How often?

Q. Yes.

A. I couldn't tell you how often I was there. That is a very poor answer to ask me, because I don't remember how often I was there.

By Mr. Shapiro:

Q. You mean it is a poor question?

A. Certainly.

Mr. Irwin: I ask you to instruct the witness not to tell me what questions to ask. If she can't answer them, she may say she doesn't know.

The Court: Don't argue with counsel. Just say yes or no if you can answer the question, and if you can't answer it,

say so.

The Witness: All right.

By Mr. Irwin:

Q. I understand from that, Miss Burdetic, that you don't know, is that right?

A. That's right.

Q. Does that same answer apply for 1937?

A. Right.

Q. At the end of 1937 there was some difficulty which developed between Mr. and Mrs. Balanos?

Mr. Shapiro: I object to this as immaterial.

[fol. 209] The Court: Objection sustained. I will grant you an exception:

By Mr. Irwin:

Q. Since the end of 1937 have Mr. and Mrs. Balanos been living together?

Mr. Shapiro: I object as immaterial, irrelevant, and scandalous.

The Court: Objection sustained. I will grant you an exception.

By Mr. Irwin:

Q. Have you seen or been in Mrs. Balanos' house since the end of 1937?

A. No.

Q. Have you seen Mr. Balanos since that time?

A. I have. .

Q. How often have you seen him in the last three weeks?

Mr. Shapiro: Objected to as immaterial. Mr. Balanos is not a party to this case.

The Courte Objection sustained. I will grant you an

exception.

By Mr. Irwin:

Q. Have you seen Mr. Shapiro about this case since it was instituted three weeks ago today?

A. I have seen Mr. Gilbride, and Mr. Gilbride sent me

to Mr. Shapiro.

Q. Have you seen Mr. Shapiro?

. A. I have.

Q. How often?

A. How often? [fol. 210] Q. Yes.

A. About twice.

Q. Have you gone to his office?

A. I have. .

. Q. Have you gone in the company of Mr. Balanos?

A. I have.

Q. Did Mr. Balanos ask you to go to Mr. Shapiro's office?

A. No.

Q. Did he tell you that he was going to Mr. Shapiro's office?

Mr. Shapiro: Objected to as immaterial.

The Court: I sustain the objection.

Mr. Irwin: Will your Honor grant me an exception?

The Court: I will grant you an exception.

By Mr. Irwin:

Q. Whom did you talk to in Mr. Shapiro's office?

A. I spoke to Mr. Barkan and Mr. Shapiro.

Q. Mr. Barkan

Mr. Shapiro. Associate counsel in this case appearing with me.

By Mr. Irwin:

Q. Did you see Mr. Rudenko?

A. I did.

Q. Did you talk to Mr. Rudenko?

A. I did

By Mr. Shapiro:

Q. They are nice people, aren't they?

A. They certainly are. They have brains.

Mr. Irwin: I haven't in any way reflected on Mr. Shapiro. These remarks during my cross-examination are uncalled for.

[fol. 211] The Court: You are absolutely right. We will strike out the remarks made by Mr. Shapiro.

Mr. Shapiro: That leaves me in the air if the answer

is out.

The Court: It is a self-serving declaration.

Mr. Shapiro: Let me say very seriously, if your Honor pleases, I don't want to object to this testimony the way it is being given, but I have never had anybody try to do this on me before, and if it keeps up much longer I shall be obliged to make a motion in connection with it which I wouldn't like to make. Just because of the smile on my face doesn't mean that I do not resent this.

The Court: If the door is put ajar, I will let it remain

open.

Mr. Shapiro: My friend was talking about newspapers, about his company, but I also have a reputation, and the same people that he is so much afraid of might get some impression it is unheard of that a lawyer should consult with a witness and find out what she knows about this case. I state here very frankly I talked to this woman and that I talked to several other witnesses and that I talked to Mr. Balanos.

The Court: Of course, sit is necessary that you do so

in order to prepare your case.

Mr. Shapiro: You wouldn't think so from the way these questions are being put, but I am not worried about that. I can give the proper answer at the proper place.

The Court: It won't affect the Court. . I suppose Mr. Irwin has talked to his clients, too. If he hasn't, he should

have.

Mr. Irwin: I have, your Honor.

The Court: All right.

[fol. 212] By Mr. Irwin:

Q. Who first told you about this case?

A. Who first told me about it? .

Q. Yes.

A. I don't understand what you mean.

Q. Who first told you that this bill in equity had been filed by Mr. Shapiro?

A. I heard it from my lawyer, Mr. Gilbride.

Q. When?

A. About three weeks ago.

, Q. Had you been in Mr. Shapiro's office prior to that time?

A. No.

Q. How often have you been there and talked to either Mr. Rudenko or to—

A. I have been there twice.

Q. Twice?

A. I told you that before.

Mr. Irwin: Thank you.
The Court: Anything else?

Mr. Irwin! Yes, if your Honor please.

By Mr. Irwin:

Q. You got your \$27 back from the Pennsylvania Company, didn't you?

A. I did after I made considerable complaint.

Q. And you told them that you were a minor at the time you bought this plan and you choose to disaffirm the contract!

A. That's right.

Q. And they gave you your money back?

A. That's right, after I made that complaint. Before that they sent me \$3.

Mr. Shapiro: You have already told us that; you don't have to repeat it.

[fol. 213] By Mr. Irwin:

·Q. Mr. Shapiro has asked you about a certain chart.

A. Yes.

Q. Do you know what that chart it?

Mr. Shapiro: I suggest that we have the exhibit number on the record so that we know what he is talking about.

Mr. Irwin: You are entirely correct. I will be very glad

to put it in. It is Plaintiff's Exhibit C-3.

The Witness: You mean what I was asked before?
Mr. Irwin: No.

The Witness: What do you mean?

By Mr. Irwin:

Q. Do you know what that chart is?

A. This chart here?

Q. Yes.

A. From what I understand, this chart is supposed to be—at the end of so many years you are supposed to get the money back, and according to here it has seven or eight.

Q. Do you know at the other end of the chart there is a date at the bottom 1898, and at the top it is 14; that is, it reaches the level of 14. Doesn't that mean that if these torty-two securities were bought in 1898 and \$10 was paid every month toward the purchase of them, that in fourteen years it would equal \$2000?

A. It has the same down here.

Q. Isn't that what that means?.

A. I don't know. I don't know much about this business only what I was told.

Mr. Irwin: All right, that's all.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Pardon me, I have just one more question. Did you ever receive any checks from the Capital Savings Plan, Inc.?

[fol. 214] A. No, sir.

Q. Did you ever receive any checks from Independence Shares Corporation?

A. No, I didn't work for them.

Mr. Irwin: That's all, thank you.

Cosme Balanos, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

Q. Mr. Balanos, you have talked to me and to my associates about this Capital Savings Plan?

A. Yes, sir.

Q. How did you come to me?

A. I saw in the newspapers that you filed a suit in equity, and I have a claim against the company, and I came to see you right away about my claim.

Q. Did you tell me some facts about the matter?

A. Yes, sir.

Q. Will you just sit back and answer some questions, and please talk slowly, it is hard to understand you as it is, and only answer the questions. Were you employed by the Capital Savings Plan?

The Court: Just find out where he lives.

By Mr. Shapiro:

Q. Where do you live?

A. Temporarily in the Delaware County prison.

Q. Where do you live outside?

A. 121 Ardmore Avenue, Ardmore, Pennsylvania.

By the Court:

Q. How long have you been there temporarily?

A. Temporarily since last Friday, your Honor.

Q. March 30th, the day before yesterday?

A. Day before yesterday, Thursday night.

[fol. 215] By Mr. Shapiro:

Q. Were you employed by the Capital Savings Plan; Inc.?

A. Yes, sir.

Q. When?

A. I was employed since 1932, and I have here-

Q. I have asked you a question, you have answered it. If we are going to make speeches we won't get through. What were your duties, what were you doing?

A. I was going around to get Capital Savings Plan sub-

scriptions.

Q. Did you have a license?

A. No, sir.

Q. Did you have a contract with the company?

A. No, sir.

Q: Did your wife have a contract with the company?

A. Yes, sir.

Q. Did you sell Capital Savings Plan?

A. Yes, sir.

Q. Did you get commissions?

A. Half and half, fifty-fifty.

Q. Whatever commissions you got were through your wife?

A. Yes, sir.

Q. We will leave that go for the time being. Tell the Court what you told these people when you seld them or attempted to sell them these certificates.

Mr. Irwin: I object to that question. If your Honor please, I object to it on the general ground, but I certainly object to it—but your Honor has already ruled on it, and I assume your ruling would be the same and an exception would be granted to me. I also object to any statement from this witness as general as that, what did you tell these people?

The Court: If he asked any other questions.

Mr. Irwin: I think he should be confined to particular people, particular instances, particular times, and not be [fol. 216] permitted to make a speech, on a thing like that.

The Court: I think you might divide it.

Mr. Shapiro: I am withdrawing the question, sir, he gave me a name—

Mr. Irwin: Pardon me, Mr. Shapiro.

Mr. Shapiro: All right.

Mr. Irwin: In addition, I object to this witness testifying as to anything that was said by him at any time, because he has already testified that he had no contract with us and he was not an agent.

Mr. Shapiro: I will withdraw this witness for a moment.

Will you step down a minute, please?

Mrs. Balanos: Take the stand, please.

JANE T. Balanos, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Shapiro:

Q. Where do you live?

A. Radnor.

Q. Pennsylvania?

A. That's right.

Q. Were you an employee of Capital Savings Plan, Inc.?

A. I was, sir.

Q. What was the nature of your employment?

A. I originally was a sales person, and I became general agent.

Q. Bid you have a contract?

A. I certainly did.

Q. Will you produce it?

[fol. 217] A. I haven't it with me.

Q. I show you a paper marked for identification Exhibit

(Agreement dated the first day of January, 1936, between Capital Savings, Plan, Inc., and Jane T. Balanos, was marked Plaintiffs' Exhibit No. 38 for Identification.)

By Mr. Shapiro:

Q. And ask you whether or not that paper bears your signature?

A. It does, sir.

Q. Is that the contract you have with this company?

A. I suppose it was the original one, yes.

Q. First of January, 1936?

A. That's right.

Q. How long did you continue to work for the company?

A. I have continued to work for the company.

Q. You are working there now?

A. Yes, sir.

By the Court:

Q. Since when?

A. I think it was in 1933, '32 or '33, I am not quite sure.

Q. 1932 or 38 and then you became general agent in 1936?

A. That's right.

By Mr. Shapiro:

Q. Just what does that mean, general agent? Did you have a right to employ other people?

Mr. Irwin: If your Honor please, I think the contract speaks for itself.

The Court: The contract speaks for itself.

[fol. 218] By Mr. Shapiro:

Q. Did you employ other people?

A. Yes, sir.

Mr. Shapiro: Of course, the contract doesn't always speak for itself, if your Honor please.

The Court: You have had her speak for it, too.

By Mr. Shapiro:

Q. Did you have group insurance? Did you come under the group insurance plan?

A. Yes, I did.

Q. Were you an employee of the company?

A. Yes, I was an employee of the company.

Q. Did you notice in your contract with this company it says that you are not an employee of the company?

A. Well, I was employed. I am probably agent for the company, I worked for the company.

Q. Under paragraph 19, the contract reads:

"Relation of Parties. It is understood and agreed that nothing in this Agreement contained shall be construed as creating the relationship of employer and employee between Capital and Salesman (Agent or Agent's Salesmen). Salesmen (Agent and Agent's Salesmen) may adopt such arrangements as he desires with regard to the details of the work and the manner of performance hereunder, free of control by Capital; provided, however, that the work shall be done by Salesman (Agent and Agent's Salesmen) in such manner as will be consistent with the terms of, and the results contracted for, under this Agreement."

Did you know that provision was in your contract?

A. I know I was an agent and employed by the company. I don't know what that is all about. I think they know I worked for them. I was general agent for them.

Q. Where did you get that knowledge, from the contract,

or from conversation with the officers?

[fol. 219] Mr. Irwin: If your Honor please, I think the contract speaks for its 'f again, and states what the relationship is.

The Court: I will overrule your objection and grant you

an exception.

Mr. Shapiro: Read the question, please.

(The question was repeated by the reporter as follows: "Q. Where did you get that knowledge, from the contract, or from conversation with the officers?")

The Court: Read the previous answer, I don't quite understand.

(The testimony was repeated by the reporter as follows: "I know I was an agent and employed by the company. I don't know what that is all about. I think they know I worked for them. I was general agent for them.

Q. Where did you get that knowledge, from the contract,

or from conversation with the officers?")

The Witness: What knowledge?

By Mr. Shapiro:

Q. The knowledge you were general agent.

A. I was appointed a general agent.

Q. By whom?

A. By the officers of the company.

Mr. Shapiro: That is all the questions I have to ask you.

Mr. Irwin: No questions.

Mr. Shapiro: Now, Mr. Balanos, will you take the stand?

[fel. 220] COSME BALANOS, recalled.

Direct examination (Continued).

By Mr. Shapiro:

Q. Mr. Balanos, with whom did you make arrangements that you should endeavor to sell investments for the Capital Savings?

A. With Mr. McCown.

Mr. Irwin: I object to that, sir. The witness has already testified he had no contract with the company.

Mr. Shapiro: I asked him with whom he made his arrangements—

The Witness: With Mr. McCown.

Mr. Shapiro: Pardon me, please—that he should sell these contracts to investors.

The Court: I will overrule your objection and grant you an exception.

By Mr. Shapiro;

Q. Now, what is the answer?

A. With Mr. Frank C. McCown, Jr.

Q. Did you sell any of these contracts?

A. Yes, I did.

Q. To whom?

A. There are contracts, one was to Mr. and Mrs. Sievers.

Q. Sievers?

A. Yes.

Q. Do you know where they live?

A. They used to live at Mrs. Billings. Mr. and Mrs. Delove.

Q. Who else

A. Mr. Frank Kromer.

Q. By the way, where do Mr. and Mrs. Deloye live?

A. Larchmont.

[fol. 221] Q. Where does Mr. Kromer live?

A. Merion.

Q. Is that H. J. Kromer?

A. No, his first name is a funny name.

Q. Who else?

A. I practically in the beginning sold everybody that she sold.

Mr. Irwin: I object to that if your Honor please, and ask that the answer be stricken out.

The Court: Why?

Mr. Irwin: Because the witness said, "I practically sold everybody"; he must state to whom he sold.

The Witness: I sold.

Mr. Shapiro: Will you keep out of the argument and just reply to the questions? I have told you that outside, and I have told you here.

The Court: What was his answer? "I practically sold

everybody?"

Mr. Shapiro: "I sold everybody that she sold."

By the Court:

Q: Whom do you mean by "she"?

A. My wife.

By Mr. Shapiro:

Q. You said you went out together with her to sell?

A. Yes.

Q. Do you remember any other occasion? If you remember, say so; if you don't, say so.

A. I remember plenty of names.

Q. Give me the names of those you remember that you sold yourself or in company with your wife.

A. Fairweather. She testified to that effect in the

divorce proceedings.

Q. I told you you should please answer the questions. [fol. 222] A. Pardon me, sir.

Mr. Shapiro: I ask that that answer be stricken out.

The Court: Strike it out.

Mr. Irwin: If your Honor please, I don't think Mr. Shapiro can move to have his own witness's answer stricken out.

The Court: I thought it was not responsive to the answer. I will direct of the Court's own motion that it shall be stricken out.

Mr. Irwin: Will your Honor grant me an exception?

The Court: No, I won't grant you an exception. It is entirely irrelevant what this woman testified to; it becomes hearsay evidence.

The Witness: Charles Bashore.

By Mr. Shapiro:

Q. Where does he live?

A. Glenloch, it is outside of Paoli in the Farm School. It is a cousin of Mr. Bashore—

The Court: Strike that out.

The Witness: I sold to Mr. Wilkins.

By Mr. Shapiro:

Q. Where does he live?

A. Same place, he is a teacher there.

Q. Who else?

A. I sold to Miss Gertrude Yarnell.

Q. Where does she live?

A. At that time she was living in Yeadon.

Q. Any more?

The Court: Do we have to go back over five or six years' sales?

[fol. 223] The Witness: I have to go back, but I can't remember everything.

By Mr. Shapiro:

- Q. What did you tell these people that this plan was?
- A. The plan
- Q. Listen to the question. First of all, from whom did you get information and instructions so far as the company is concerned as to what this plan was and what you were to tell the people?
 - A. From the company.
 - Q. Who, particularly?
 - A. It was a man by the name of Shelton, Herb.
 - Q. What was his connection with the company?
- A. He was vice-president, sales manager, I think everything.
 - Q. Who else?
 - A. There used to be a fellow by the name of McCutchin.
 - Q. What was his job?
 - A. Sales manager.
 - Q. Who else?
 - A. A fellow by the name of Allen Young.
 - Q. Who else?
 - A. And Mr. McCown.
- Q. When these people told you what this plan was and what you were to tell the investors, what was it they told you?
- A. They told us to sell the investment with the insurance, \$10, to make a deal of \$2000.

By the Court:

Q. \$10 a month?

A. \$10 a month; yes, sir, your Honor, and they might get \$2000 sooner than ten years, when they didn't have to pay any longer, but in no event they are going to invest more than \$1200.

By Mr. Shapiro:

Q. That is on a \$10 payment?

A. \$10 payment. Then they told us about insurance. [fol. 224] Q. What did they tell you about that?

A. They told us the additional cost which the investor will not have to pay at once, like in paying every month, but the company deducts that.

Q. Out of the \$10?

A. Out of the \$10; they can insure that plan by an insurance policy on the life of the prospect.

Q. What was that insurance?

A. That insurance was \$600 for \$5 a month, and \$1200 for \$10 a month.

Q. When was it payable, and how?

A. That was a controversy, how it was payable. I couldn't find out how it was payable.

Q. What did they tell you?

A. It was raid to the investor, to the beneficiary, rather, of the plan.

Q. When?

A. As soon as he died or proof of this was submitted to the company.

Q. In connection with that matter I ask you whether you have ever seen a copy of this Exhibit C-24?

A. Yes, sir; I did.

Q. Where did you see it?

A. In the kit they gave us to go out and sell.

Q. You mean the company gave you kits?

A. Yes, sir.

Q. What was in the kits?

Q. First of all, the first page was the doors of the Pennsylvania Company.

Q. The doors of the Pennsylvania Company?

A. One Mr. Yellin made. After we take the doors there was a financial statement of the Pennsylvania Company. Then we had a letter from Mr. Kriebel, vice-president of the Pennsylvania Company. That letter was sent to a man by the name of O'Connor in Trenton, Pennsylvania, in which Mr. Kriebel told him how wonderful is the investment, and how he, himself, bought a plan.

[fol. 225] By the Court:

Q. Who was Mr. Kriebel?

A. Vice-president and cashier of the Pennsylvania Company.

Mr. Irwin: I think he means Mr. Kriebel who is cashier and vice-president.

The Court: Spell it.
Mr. Irwin: K-r-i-e-b-e-l.

The Witness: That letter was sent out to this man as one of the salesmen approached him for a plan, and he wanted

to know something direct from the Pennsy vania Company, what kind of an investment was that.

By Mr. Shapiro:

Q. What was the next?

A. Next was a letter from Lukens Steel Company, and that letter was addressed to Mr. Heckscher, who used to be on the board of directors of Capital Savings Plan, and in this letter he stated that he had investigated this plan, he had talked it over with Mr. Kriebel, and he gives permission to contract employees for the plan.

By the Court:

Q. Who said that?

A. President of the Lukens Steel.

By Mr. Shapiro:

- Q. Gives you permission to canvass the employees of the Lukens Steel Company?
 - A. Yes, sir.

Q. What else?

A. There were several other letters of that character, and then there were some things about sending checks out.

Q. When was that?

A. That is insurance checks to show how they pay when a man dies. There was some checks from the Connecticut General, and then there were some other checks made by the [fol. 226] Connecticut General to the Pennsylvania Company, Trustee.

Q. To whom was that made out?

A. This is made to the Pennsylvania Company, Trustee, but there were some other checks there from the Pennsylvania Company, Trustee, to the beneficiary.

Q. I show you other papers which I will have marked for identification Exhibits 39, 40, 41, 42, 43, 44, and 45 for

Identification.

(Copy of letter dated February 1, 1936, to Capital Savings Plan, Inc., from Connecticut General Life Insurance Company, was marked Plaintiffs' Exhibit 39 for Identification.)

(Copy of letter dated December 18, 1936, to Capital Savings Plan, Inc., from Connecticut General Life Insurance

Company was marked Plaintiffs' Exhibit 40 for Identifica-

tion.)

(Copy of letter, undated, on the stationery of Connecticut General Life Insurance Company, in regard to William C. Kahn, was marked Plaintiffs' Exhibit 41 for Identification.)

(Copy of letter undated, on the stationery of Capital Savings Plan, Inc., in regard to Miss Dorothy M. Evans was

marked Plaintiffs' Exhibit 42 for Identification.)

(Copy of letter dated January 31, 1935, on the stationery of Capital Savings Plan, Inc., in regard to Robert W. Wilsbach, was marked Plaintiffs' Exhibit 43 for Identification.)

(Copy of letter dated June 28, 1935, to Capital Savings, Plan, Inc., from Connecticut General Life Insurance Company was marked Plaintiffs' Exhibit 44 for Identification.)

(Copy of letter dated June 4, 1934, to R. A. Bonner, Treasurer, Capital Savings Plan, Inc., from Connecticut [fol 227] General Life Insurance Company, was marked Plaintiffs' Exhibit No. 45 for Identification.)

By Mr. Shapiro:

Q. I ask you to tell me whether these are copies of papers that were in that kit?

A. Yes, sir.

Mr. Shapiro: I offer those in evidence, if your Honor-please.

Mr. Irwin: I object to the offer of those until they are relevant. Until that is shown I want to note my objection, sir.

The Court: I will overrule your objection and grant you

an exception.

Mr. Shapiro: The object of this is to show the persons did not get the checks at all, as was represented to them but the checks went to the Pennsylvania Company when the man died, went from the insurance company to the Pennsylvania Company and held there instead of being turned over as represented to the investor, that the beneficiary would get the check upon the death of the insured. The check went to the Pennsylvania Company to be retained by them and was not sent to the insured.

Mr. Irwin: And paid up the premium for his shares.

The Court: Frankly, that is what my understanding of it was.

Mr. Shapiro: That was not my understanding of what was represented. What was represented to these people was when the man died, the insured died, the beneficiary got the check.

By Mr. Shapiro:

Q. What else was in the kit, if you recall?

A. In the kit was a specimen of Independence Trust Shares, was a copy how the shares were made.

[fol. 228] Q. How what?

A. How the market everyday, how the portfelio was made.

Q. That is, of the forty-two shares?

A. No, these were for the six shares. Then there were testimonials that they bought contracts; then there were some charts showing how the money was used; then there were computations how our plan was better than an insurance company and better than a savings bank. There were comparisons that Capital Savings Plan is better than these things, and then there was a comparison from the Investors' Syndicate, that was another form of investment trust that we had quite a competition from. There was a comparison, a balance sheet, and assets to compare how they were better than they were. There was a table there of valuations, how the plan matures in so many years, and so on.

Mr. Shapiro: I ask that this paper be marked for identification Plaintiffs' Exhibit 46.

(A copy of tables in sales kit we smarked Plaintiffs' Exhibit 46 for Identification.)

By Mr. Shapiro:

Q. Tell the Court what this paper, Exhibit 46, marked for identification is.

Mr. Irwin: If your Honor please, I think the exhibit speaks for itself, and we don't need the characterization of the witness.

Mr. Shapiro: Let me finish the question.

By Mr. Shapiro:

Q. Is that the copy of the tables that was in the kit?

A. Yes.

Q. And just what the plan is worth at the end of ten years, nineteen hundred and some odd dollars? [fol. 229] Mr. Irwin: If your Honor please, I object to that question. The exhibit speaks for itself, and not Mr. Shapiro.

Mr. Shapiro: All right, I will offer this paper in evidence,

and I call your Honor's attention to the fact-

Mr. Irwin: If your Honor please, I object to Mr.

Shapiro----

Mr. Shapiro: I offer it in evidence and hand it to the Court. I ask your Honor to look at the valuation at the end of three years, and ten, so that you may follow the exhibit as it develops.

By Mr. Shapiro:

Q. Can't you remember anything else that was in that kit?

A. Yes, there were several talks, tell you what money can

do, and all that talk, you know.

Q. When you went out to sell the people tell me what you told them with respect to the plan, its maturity, its safety, the insurance, and their ability to get their money back.

Mr. Irwin: If your Honor please, I object to that question. The witness has already testified to that. I object to it as leading because he has called this man's attention to certain things that he wants to emphasize, and he also testified he had no contract with our company.

The Court: I have already ruled on that phase of it. It

is a leading question, Mr. Shapiro.

Mr. Shapiro: I don't think every question which directs witness's attention to a subject matter is leading, not by any means. What I am doing is confining this witness—

The Court: I think you are trying to save time.

[fol. 230] Mr. Shapiro: Yes, and confine him in his testimony. If they don't want that, I will withdraw the question and ask the witness to tell us all his conversation with the investors about the plan.

The Witness: I couldn't talk to the investor what was in that plan; I couldn't explain the plan because we didn't know ourselves what was in the plan.

By Mr. Shapiro:

Q. What did you tell the investor?

A. If you want to make \$2000, save your money with the Pennsylvania Company, all right, put your money here, and when the company invests that money, then they give you a return of \$2000, and I have one here in my pocket to show them how the Pennsylvania Company invests their money outside. Your money is invested—

Mr. Irwin: Is that C-3?

The Witness: No, it is not C-3. We had five or six of those.

By Mr. Shapiro:

Q. Won't you listen to me and answer the question? I don't care what you could or could not do. What I want you to tell the Court is what you told these people about this plan, all that you told them.

A. Anything that could be told.

- Q. Won't you answer the question and tell us what you told them?
- A. I told them they could make some money by putting ten dollars in the Pennsylvania Company.

By the Court:

Q. What do you mean, putting ten dollars?

A. A month.

Q. How many years?

- A. For ten years, that would be the limit.
- Q. At the end of ten years what would happen?

A. \$2000.

Q. They would get \$2000?

[fol. 231] A. They would get \$2000. I showed them the prospectus and showed how it would mature.

Q. Did you tell them anything else?

A. I told them if they die they could get the insurance, and tell them everything that we could tell them in trying to induce them to take the stock.

Q. We want to know some of the things that you told them to induce them to purchase. With respect to the insurance did you tell them the money would go to them, that the proceeds of the policy would go to their beneficiary?

A. To their beneficiary, that was understood, of course.

By Mr. Shapiro:

Q. Now, talk about what we are asking you to tell us. Without putting things in your mouth, tell us what you told the man in order to sell him the contract. I am not interested if you told him you liked his looks, but something in connection with this plan. What did you tell them? You tried to sell them the contract, didn't you?

A. Yes, sir.

Q. What did you tell them?

A. The Pennsylvania Company will invest your money, and the Pennsylvania Company can get a better return for you than what the savings bank can give you, or better than if you put it in life insurance.

Q. Did you talk with the officers of the company and afterwards with the investors in the company when the money

could be returned, and how?

Mr. Irwin: If your Honor please, I object.

The Witness: I did.

Mr. Irwin: I object to that as leading.

The Court: I am going to overrule your objection: With a witness of this type it is almost impossible to ascertain the facts unless there is some questioning. A leading question strictly construed is a question which defines the answer, gives the answer. I don't think that a question of [fol. 232] that type gives the answer. Of course, I will have to rule on each and every question. Repeat the question.

Mr. Shapiro: I will strike it out and put it this way.

By Mr. Shapiro:

Q. Did you talk to the man to whom you were trying to sell this contract about the question of insurance?

A. Yes, sir.

Q. Will you tell us what your discussion with him was about that?

A. I was telling the man that in case he died he puts in

\$10, start the payment, in case he died, at once his estate gets \$1200.

Q. That is on the \$5 payment?

A. \$10 payment.

Q. Did you talk with him about the circumstances under which, or the time when he could withdraw his money?

A. Yes.

Q. What did you say to him about it, and what was the discussion?

A. We told him there would be a charge of \$60 and at the end of the third year he can take his full money out, and to show him this chart that we have now.

Q. What was the full money?

A. \$360, according to the chart he would get \$375 at

Q. When you sold these certificates or these contracts, to the investor, did you discuss with him anything about,

first of all, charges by the company against his money?

A. Yes, we were telling him that the company was taking a fee of \$60.

By the Court:

Q. Which company?

A. Capital Savings Plan, and also the Pennsylvania Company was getting twenty-five cents a month for Trustee charges.

[fol. 233] By Mr. Shapiro:

Q. For what?

A. Trustee charges.

Q. Any other charges you told them about?

A. No.

Q. Did anybody in the company, any of the officers or the persons with whom you say you discussed this contract—did they tell you of any other charges?

A. They did and they did not. They always when we asked any question about the other charges, they said it is a complicated matter, and we don't know, ourselves, what it is all about.

Q. They told you their other charges, but they didn't tell you what they were about?

A. They couldn't understand these things.

Q. Did you ever explain to these investors any other charges?

A. I couldn't tell them that; there were \$200 altogether.

Q. What?

A. The charges were \$200; I couldn't tell them that.

Q. Did you know it?

A. Of course.

Q. You didn't tell them?

A. No, sir; I couldn't make any money.

Q. How did you figure out the \$200 charge?

A. There were 9 per cent. overwriting in making the portfolio.

By the Court:

Q. To whom?

A. To the Independence Trust Shares Corporation, which was owned outright by Capital Savings Plan. We have about six companies, we have Capital Savings, Independence of Delaware, Independence of Pennsylvania, Capital Savings Plan Distributor, they have another Capital Savings Plan Distributor, Independence Trust Shares and Independence Trust Shares Purchase Plan; it is a trust upon a trust upon a trust, see? If his Honor allows me—

[fol. 234] By Mr. Shapiro:

Q. We don't want any speeches. What other charges were there?

A. There were the compound—they call them in the new sales points, they called the compound reinvestment.

Q. What is that?

A. That is taking stocks out and liquidating them, and buying more, and liquidating them out, and liquidating them again, and making commissions over and over again like compound interest.

Q. You mean there was a charge every time they made

an investment or repurchase of shares?

A, Yes, 9 per cent. every time, now 7½ per cent.; it is 4 per cent. 9½ per cent., ½ per cent., 1½ per cent., and the Pennsylvania Company wants to get more—

Q. Tell me about those charges that you just recited.

You said 2½ per cent. and 4 per cent.

A. First of all is 9 per cent. for making the shares, writeup. Then after they decide to sell a few shares out of the portfolio they take that money to reinvest for the benefit of the contract holders. Then they make again another

>-/-

9 per cent. Then the portfolio had shares of stock. If they were selling from a list out of this again, they were invested again, they were making another commission. You see, in other words, they were taking a commission not once, but every time they were buying and selling. That was 9 per cent.

Mr. Shapiro: Cross-examine.

Mr. Irwin: Will your Honor indulge me by having a fiveminute recess?

The Court: Certainly.

(Recess at twelve o'clock noon.)

[fol. 235] COSME BALANOS, resumed.

Cross-examination.

By Mr. Irwin:

Q. Mr. Balanos, you mentioned in the course of your odirect examination that somebody testified in a divorce proceeding. Your wife has instituted a divorce proceeding against you, has she not?

A. Yes, sir.

Q. And you are contesting that proceeding?

Mr. Shapiro: Objected to.

The Court: Objection sustained. I struck it out on direct examination.

Mr. Irwin: If your Honor please, if I recall correctly

there was no striking out of the testimony as to this.

The Court: I will rule on it now. It is immaterial as to whether he is suing his wife or not. If they are not living together you may bring that out to show there may be possibly some feeling.

. Mr. Irwin: If your Honor please, it is also-

The Court: It is so immaterial-

Mr. Irwin: Will you hear me a moment?

The Court: Just a moment. It is so immaterial to my mind that I will overrule Mr. Shapiro's objection and let you proceed.

By Mr. Irwin:

Q. Your wife brought a divorce proceeding against you, didn't she?

A. Yes, sir.

Q. And you are contesting it?

A. Yes, sir.

Q. How long have you been living apart? [fol. 236] A. Two years and four months.

Q. Two years and four months?

A. Yes, sir.

Q. You have not been living together since December, 1937, is that right?

A. 1936.

Q. December of 1936?

A. 26 of December, 1936.

Q. 1936; you haven't seen your wife or lived with her since that time?

A. Yes, I did, with my wife; we had an agreement about the divorce and she went back on the agreement. It was a big story. Mr. McCown is connected with this case—

The Court: Now—

Mr. Shapiro: That is what I have tried to avoid.

The Witness: I can tell them what has happened. I saw the libel, the salesmen of the agency had their names there and accused me.

Mr. Shapiro: Suppose you sit down.

By Mr. Irwin:

Q. When did you first learn of this suit?

A. I saw it in the paper.

Q. You saw it in the paper on Sunday, March 12?

A. That is correct.

Q. And what did you do on Monday? Go to Mr. Shapiro's office?

Mr. Shapiro: Let him answer.

The Witness: On Monday I went to Mr. Shapiro's office and I put my claim in.

By Mr. Irwin:

Q. You took your claim in. Whom did you see there?

A. I saw the-

Q. Was Mr. Rudenko there?

[fol. 237] Mr. Shapiro: Let him answer.

Mr. Irwin: This is cross-examination, if your Honor please.

The Court: You are both wasting time.

Mr. Irwin: If your Honor please, this is cross-examination, and I ask Mr. Shapiro not to interfere.

The Witness: I saw the Senator personally, Mr. Irwin,

By Mr. Irwin:

Q. Did you talk with Mr. Rudenko?

A. Afterwards we talked to all of them; yes, sir.

Q. Did you talk to Mr. Barkan?

A. Yes:

Q. How many times have you been in the office since you, saw this in the newspaper?

A. Oh, maybe about three times.

Q. About three times. Now, were you in the Pennsylvania Company, or in the building at Fifteenth and Chestnut Streets after this suit was started telling people not to put their money in?

A. No, I was there to see my friend, and I saw him.

Q. Mr. Cooper?

A. Yes, I was at Mr. Cooper's desk.

Q. Is this Mr. Cooper?

A. That is Mr. Cooper.

Mr. Irwin: Stand up, Mr. Cooper.

(A gentleman stood up in the courtroom.)

By Mr. Irwin:

Q. Was it he you saw that day?

A. Yes.

Q. Did you go into him and say to him there is a receivership for the Independence Shares Corporation, and I have the bill?

[fol. 238] A. No, they are applying for a receivership.

Q. And you went in to tell that to Mr. Cooper?

A. Yes, because I had previously talked with Mr. Cooper about my money. I wrote to the Pennsylvania Company to come down to my lawyer. They saw the people with whom I had a contract. They made their complaints. Mr. Whetstone was in front, and Mr. Geary said, "You signed these papers, boys; you can't do nothing."

If you want to know the whole story, it is a story, and I can tell you. Mr. Whetstone came in the office in Media, and he saw the people to whom I sold, because I got a bad spot, because they told me not to tell the charges to the

people when I sold those contracts. I am in jail today because they didn't want me to come here and testify. I can explain to you, if someone wishes to know the particulars about this case—

Mr. Shapiro: Just answer the questions.

By Mr. Irwin:

Q. You are in jail at the present time because your wife had you arrested, and because you failed to pay the costs in the divorce proceedings that were charged against you, is that correct?

A. No, it is because they didn't want me to come here and testify, because I am on the relief, and they stole every-

thing away from me.

• Q. Isn't it a fact that the proceedings against you now are by reason of the fact that your wife, Mrs. Balanos, had you arrested because you failed to pay the costs that were charged against you in the divorce proceedings? Have you paid the costs that the Master has assessed against you?

The Court: How long are we going on with this?

Mr. Shapiro: I am not going to object to it at all—

The Witness: No.

Mr. Shapiro: —if this gentleman wants to ask those questions.

[fol. 239] The Court: I am not interested in the private lives of the witnesses and parties in this case.

By Mr. Irwin:

Q. Do you know Mr. Nelson?

A. Very well.

Q. Mr. Nelson is in the real estate business in Ardmore?

A. Yes, sir.

Q. How often have you been in his office in the last few weeks?

A. Every day; I stop every day.

Q. And you have told him that you were going to put this company out of business?

A. Unless I get my money.

- Q. Yes, you have told him you were going to put this company out of business?
- A. Yes, sir; I have a claim against that company of \$6,000. They put me before the Federal authorities, the

Postal authorities. They sent my letters addressed to the company to the Federal authorities, and Mr. Leonard, the inspector of the post office, examined me, and he says, "My boy," he says, "I know all about it."

It was me that brought the investigator here from Harrisburg. What did they do? Nothing. I caught the investigator in my wife's apartment at 12:00 o'clock at night

drinking.

The Court: How much of this do you want.

Mr. Irwin: If your Honor please, it indicates this man has a bias, a hatred—

The Witness: I have a claim.

Mr. Shapiro: Yes, I want your Honor to consider his own interest in this case.

The Witness: I have life i surance to show I was employed as an employee of the company.

[fol. 240] Mr. Irwin: Please. If your Honor please, I ask

that be stricken out.

The Court: I won't strike it out.

The Witness: I have been connected with this case eight

years. I lost my home.

The Court: Just compose yourself, Mr. Balanos. This is not a shouting contest here. Won't you examine him on things that are material?

The Witness: Your Honor, you can see this-

The Court: No.

Mr. Shapiro: Put that in your pocket—let us have it, we will take charge of it.

By Mr. Irwin:

Q. Do you know Mr. Frank Irete?

A. I know Mr. Frank Irete.

Q. From Devon?

A. Yes.

Mr. Irwin: Is Mr. Irete here? Will you stand up, Mr. Irete?

By Mr. Irwin:

Q. Mr. Irete conducts a drug store in Devon, doesn't he?

A. Yes.

Q. And his wife is an agent of Capital Savings Plan and Independence Shares Plan?

A. Not when I was manager of it, no; it must be since my agency. As a matter of fact, in that bill of particulars you will see his wife's name, too, that I interfered with their sales for 1937. The way the company instructed is the way I sold them.

Q. Have you been in Mr. Irete's place within the last two or three weeks since this bill was filed?

A. Yes, sir.

[fol. 241] Q. Have you told him in his place you were

going to put this company out of business?

A. I told him to take care of his wife, to be careful what was going on, because maybe the Justice Department will come after this case. I don't know what might come in this case, what would be the end.

Q. You know Mrs. Fairweather, don't you?

A. Very well.

Q. She was a friend of your wife and yourself?

A. Both of us, yes, sir, I sold her a plan, and I explained in the letter exactly the whole workings of the thing, because in the proceedings of my divorce they think that she is going to make a charge against me by saying I sold her the plan, but I was employed by Mr. McCown, because she was working for the company three months before she could get a license: Mrs. Fairweather admitted I sold her the plan, thinking she was going to make things very bad against me, and she changed her testimony saying two years, so I wrote a letter—

The Court: Now, you are just wasting the money of the parties to this suit by having this matter incorporated in the record.

By Mr. Irwin:

Q. Did you ever write a letter to Mrs. Fairweather?

A. Yes, sir, and explained the whole workings of the plan. I am here in the United States for twenty-five years. I never left Philadelphia. I never been away from Philadelphia and surroundings, and I have nothing against my record. I want to clear my position with these people that I unfortunately take some money under false pretense by instruction from men getting \$23,000 salary. My wife sells now. There are plumbers, bankers and real estate men.

Q. Do you have a plan now?

A. I have different plans and lost money.

Q. I say do you have a plan now?

A. I drew my plans out, and here is-

Q. I asked you if you have a plan now?

[fol. 242] A. Under the conditions that the Securities and Exchange. Commission places on the company, I demanded from the company full price I pay for my plans. Here is my price. They are insolvent to the extent of over a million dollars, and I can prove to you how they are doing that. Do you want to see this?

Mr. Shapiro: Yes, I want to see them.

The Witness: I can explain the plan to you better than

themselves; I studied it for eight years.

The Court: We haven't yet on the record is this man a planholder, and what kind of a plan? Give us some of the relevant things we ought to know about.

The Witness: There is a date the third of April, both of

them; one 1935 and the other 1936.

Redirect examination.

By Mr. Shapiro:

Q. You have two plans?

A. Yes.

Q. This certificate, No. A-7215, is a ten dollar plan and the other number is A-10062, a ten dollar plan. They speak for themselves, and I will offer them in evidence and ask that they be marked 47 and 48.

Mr. Irwin: If your Honor please, that is a little out of

Mr. Shapiro: Not necessarily, it is still my case.

Mr. Irwin: -for Mr. Shapiro to offer them in evidence.

(Notice of payment due to the Pennsylvania Company, Trustee, to Mr. Cosme Balanos, on Certificate No. A-7215, was marked Plaintiffs' Exhibit 47.)

(Notice of payment due to the Pennsylvania Company, Trustee, to Mr. Cosme Balanos, on Certificate No. A-10062 was marked Plaintiff's Exhibit 48.)

[fol. 243] The Court: It was my intention to ask a question of this witness, inasmuch as this was not covered in the direct examination.

By the Court:

Q. When did you first subscribe to the plan?

A. April 3, 1935.

Q. And that was a Capital Savings Plan?

A. Capital Savings Plan, sir.

Q. And that was ten dollars?A. Ten dollars, with insurance.

Q. How long did you pay on it?

A. I paid—as a matter of fact, I didn't pay. The company was paying for that, charged to my account; I had a drawing account.

Q. Until what time was it paid?

A. It was paid up to and including December, 1936.

Q. 1936?

A. The other plan-

Q. Had any of that money been returned to you?

A. About \$130. I lost \$80.

Q. \$210 paid in, and you recovered \$130?

A. Yes.

Q. What about the other subscription?

- A. The other subscription was April 3, 1936, paid up ninemonths. That has a value of \$20.
 - Q. Was that a five or a ten dollar plan?
 - A. That was ten dollars with insurance.

Q. And you paid in?
A. I paid in \$90.

Q. You received how much?

A. Nothing. They said it had a value of \$20. I sold that plan to somebody else and got \$40.

Recross-examination.

By Mr. Irwin:

Q. You sold your plans?

A. Yes. I had to pay them, it was compulsory for the salesmen of the company. My wife didn't buy any plan. [fol. 244] Q. Did your wife have a plan?

A. No. It was compulsory for everybody to have a plan. The vice-president was getting \$23,000. This is the biggest swindle that ever existed in the United States.

The Court: Strike the remark from the record. Mr. Shapiro: Yes, I ask it be stricken. Don't call names. The Witness: No, I don't call anybody names. My education don't allow me to call anybody names; let them call me names.

The Court: Anything else?

Mr. Irwin: No further questions.

By the Court:

- Q. I would like to ask one question. You spoke of a \$200 charge made, didn't you? You said the total charge for the company amounted to \$200?
 - A. Yes.
 - Q. Were you referring to the ten dollars plan?
 - A. Yes.
- Q. Did you mean by that, that against every \$1200 paid in over a ten-year period there would be a charge or charges totalling \$200?

A. No, your Honor; the total charge for the ten dollars a month plan without insurance is \$189.60.

Q. How do you arrive at that figure?

- A. I arrive in this way: it is \$60 for the Capital Savings Plan; it is \$3 for the Trustee; then there is 9 per cent. on the \$1140.
- Q. You included in that \$200 charge just the one 9 per cent. charge?
 - A. Yes.

Q. You spoke before of resale.

A That doesn't include that. Another thing, with the insu ance is about \$57, if you have insurance.

[fol. 245] Q. That wouldn't be a charge which would accrue to the company, itself; that money went to the insurance company?

A. Yes, sir, insurance plan.

By Mr. Shapiro:

Q. That was deducted from the payments?

A. Yes.

The Court: I know, but he spoke of a \$200 charge which accrued to the company, and the reason for my questions was that I didn't know whether in that \$200 he calculated more than one charge of 9 per cent., and I intended to ask this witness as to how he knows, and from what information he could give it to us, and about the 9 per cent overwriting

charge on reinvestments, but he says he knows of no such charge. That is all.

Mr. Shapiro: I would like Mr. Geary to come back for just a question or two.

ALFRED H. GEARY, recalled.

Cross-examination (Continued).

By Mr. Shapiro:

- Q. Without going into the contents of any or all of these papers, I would like to ask whether it is not true, and you know as a fact that there was considerable publicity given the proceedings, the Federal Securities Commission proceedings which were instituted against this company and which have been referred to here in this testimony.
 - A. There was.
- Q. And that publicity took the form of accounts of the proceedings in the newspapers?
 - A. That is correct.

By the Court:

Q. As I understand it, your capitalization is \$111,800, and you have 1058 shares outstanding?

A. Sixty shares were repurchased for the treasury, your. Honor.

[fol. 246] Mr. Irwin: If your Honor please, that is just a list of stockholders and the number of shares now, and the question was as to how much was paid originally.

By the Court:

- Q. The issued stock is \$105,800?
- A. That's right.
- Q. . Not \$111,800?
- A. That's right.

By Mr. Shapiro:

Q. When the company insured its employees under a group insurance plan were the policies of insurance sent to the company and then distributed by the company to its employees?



A. I don't recall the procedure.

Q. Of course, that was a plan to insure your employees?

A. Employees and salesmen.

Q. I show you a policy of insurance with the Connecticut General Life; it certifies that it insured certain employees of Capital Savings Plan, Inc., made out to Cosme Balanos, an employee, in the sum of \$1000, making his wife, Jane T. Balanos, beneficiary. I suppose you are familiar with that?

Mr. Irwin: Where is the employee there? Mr. Shapiro: I read it from the policy.

By Mr. Shapiro:

Q. Is that right?

A. Yes.

Mr. Shapiro: I offer that in evidence and ask that it be given a consecutive exhibit number following the stockholders list.

(A policy of Connecticut General Life Insurance Company certificate No. 165, to Cosme Balanos was marked Plaintiffs' Exhibit 77.)

[fol. 247] Mr. Shapiro: Now, if your Honor please, I ask that we be furnished with the record information we re-

quested this morning.

Mr. Bohlen: If your Honor please, I called the officer of the Pennsylvania Company that handled these matters. I found there are three trust agreements under which Capital Savings Plan certificates are issued. The one under which all of the testimony that I have heard is related to is the agreement of May 1, 1934. There were two prior ones.

Under an agreement in December, 1931, we have for investment approximately \$2800, and no money for distribution. Under an agreement of 1932, August 9, 1932, we have approximately \$71,000 for investment, and \$1600

for distribution.

The Court: Give me the figures again, please.

Mr. Bohlen: The agreement of December, 1931-

The Court: \$71,000?

Mr. Bohlen: The first item is \$2800 for investment, nothing for distribution; the second agreement, of 1932, \$71,000 for investment and \$1600 for distribution. Under the agreement of May 1, 1934, we have \$473,000, approximately, for

reinvestment, and \$29,400 for distribution. That makes a total under the three agreements in which the seven and a half per cent—I call it load; what is it?

Mr. Shapiro: Mark-up.

Mr. Bohlen: Of \$546,800 for investment.

The Court: \$546,000.

Mr. Bohlen: And \$800 for investment, and \$31 for distribution. Under the Independence Purchase Plans there is \$7700 for investment and \$900 for distribution. As to that, there is a 4 per cent deduction before the money is invested.

[fol. 248]. The Court: That is the \$7700?

Mr. Bohlen: Yes. Now, also, I don't know whether it is brought out in the testimony, but funds for distribution include the normal income. As I understand the distribution is forty cent a share, of which three cents represents income and thirty-seven cents represents the capital. These also are approximate figures; these are approximate figures because I can't give you the actual dollars and cents for the reason as certificate holders come in and withdraw we have to withhold moneys which might otherwise be invested.

The Court: That totals \$585,000, and \$662,000 represented the proceeds from the sale. Where is the difference?

Mr. Shapiro: What happened to the difference?

The Court: That is what I am asking. Mr. Shapiro: That is \$80,000, isn't it?

Mr. Boblen: There are other holders of Independence Trust Shares. There are shares held by the public, and also shares which are purchased for—

The Court: I am afraid I don't understand what you

mean when you say shares held.

Mr. Bohlen: Well, Independence Trust Shares, as Mr. Geary testified, was organized in 1930. They didn't start the plans until 1931. He testified that those shares were distributed through dealers.

The Court: In other words, the Pennsylvania Company

is not the Trustee as to the balance of that fund?

Mr. Bohlen: They are the Trustee of the investment trust.

The Court: I say there are some \$80,000 you are not investing.

[fol. 249] Mr. Bohlen: That's right. We are also Trustee, you will remember, for Income Foundation and National Plan.

The Court: I took \$662,000 as relating to Independence Shares Corporation.

Mr. Bohlen: Yes.

The Court: And its plans.

Mr. Bohlen: No, there are also, as I say, members of the public who hold Independence Trust Shares; there are the shares that the Pennsylvania Company holds under the plans of Income Foundation and National Plan.

Mr. Shapiro: What did you do with the other \$80,000?

Mr. Irwin: If your Honor please, I think I can clear up your Honor's mind on that thing. You see, all the underlying stocks—I mean these seven underlying stocks back of the Independence Trust Shares have been sold. The \$662,000 represents all the proceeds of the sale of all those underlying shares. Against those were issued Independence Trust Shares, but the Independence Trust Shares, which are in our plans or have any connection with Capital Savings, or Independence Shares Corporation are in the figures included by Mr. Bohlen.

The Court: What you mean, as I take it, then, is that involves or relates to the certificates issued by Independence

Trust Shares.

Mr. Irwin: No; other plans were fully paid on partial payment plans which Capital Savings Plan, Inc., or Independence Shares Corporation have issued.

Mr. Bohlen: I think I can answer Senator Shapiro's question. The remaining \$80,000 is to be distributed to the [fol. 250] holders of Independence Trust Shares that were not involved in our immediate situation.

The Court. How much is there?

Mr. Bohlen: Well, now, I would have to know the amount—we have had testimony only as to the amount that was realized from the sale of the seven underlying stocks. There is also a distribution of income.

The Court: What will be done with the \$80,000?

Mr. Bohlen: It will go to whoever is the holder of the Trust Shares.

Mr. Shapiro: You mean that is what you are going to do with it, what the Pennsylvania Company is going to do with it?

Mr. Bohlen: We are sending it out to the holders of the trust, yes.

Mr. Shapiro: How much of the \$80,000 are you going to send out to the holders of trust shares?

Mr. Bohlen: I can't answer that.

Mr. Shapiro: You divided it into groups. Who is getting this money? There is a difference of \$80,000 and you can't tell us who will get the \$80,000.

Mr. Bohlen: I am telling his Honor we are paying the money to the holders of Independence Trust Shares en-

titled to the distribution.

Mr. Shapiro: Aren't these people holders of record?

Mr. Bohlen: No, they are not.

Mr. Shapiro: Then there is another group. How much do they participate in the \$80,000? Some of it certainly comes off as charges. The Pennsylvania Company is getting some of it, aren't they? How much of the \$662,000 goes to the Pennsylvania Company?

[fol. 251] Mr. Bohlen: I can't answer your question right

now.

Mr. Irwin: If your Honor please, I think-

The Court: You have been speaking about \$80,000; it is \$77,000.

Mr. Irwin: If Mr. Shapiro wants that testimony he can bring somebody down here from the Pennsylvania Company. I don't think he should put it up to Mr. Bohlen and charge him with it.

Mr. Shapiro: We underst ... Mr. Bohlen would bring the

figures. I don't criticize him for it.

Mr. Bohlen: I have the figures which relate to the reinvestment of funds for the holders of these plans before your Honor which involve the additional charge of 7½ per cent and the deduction of 4 per cent, and that, as I saw it, was the principal matter before your Honor. It was the matter in which your Honor wanted to know how much money was involved.

The Court: Well, I didn't know of the existence of any other kind—I don't know what to call them, beneficiaries.

Mr. Shapiro: You mean there is 7½ per cent being charged, on how much?

Mr. Bohlen: On \$546,800.

The Court: I think I know what is in the picture, but I hesitate to say so; I may be in error.

Mr. Shapiro: I understand from Mr. Balanos there is a

21/2 per cent charge made on \$546,000.

Mr. Bohlen: No, not quite that. The shares were bought at \$546,000, which will be bought in a price which will include a mark-up of 7½ per cent.

The Court: You both mean the same thing.

[fol. 252] Mr. Bohlen: The fraction is different.

Mr. Shapiro: Let's see the mechanics of that. For instance, you say you have \$546,000 to reinvest?

Mr. Bohlen: Yes.

Mr. Shapiro: Will \$546,800 be reinvested, or will \$546,000

less 6 per cent?

Mr. Bohlen: The amount which will be invested will be \$546,800, approximately. These are approximate figures. They will be invested at a price which will include a mark-up of $7\frac{1}{2}$ per cent.

Mr. Shapiro: The investors will have to send a check to

pay another 71/2 per cent.

Mr. Bohlen: Oh, no.

The Court: What he means is this, this \$546,000 purchase covers the 7½ per cent mark-up. They actually pay this money, I understand, to Independent Shares Corporation.

Mr. Shapiro: That is what I want to know. They pay the

7½ per cent to them. The Court: Yes.

Mr. Shapiro: That is what I want to find out.

The Court: They buy the stock from Independence Shares Corporation at a mark-up of 7½ per cent of the cost price to the Independence Shares Corporation, isn't that correct?

Mr. Bohlen: Yes, Independence Shares get 7½ per cent

only-

The Court: It cost them 530 odd thousand, or 520, what-

ever it may be; you have to make the calculation.

Mr. Bohlen: We talked about the difference on the markup and the deduction. I understand 7½ per cent equals about 6.8 on the deduction.

[fol. 253] Mr. Shapiro: That is after there has been approximately $2\frac{1}{2}$ per cent taken off for the Pennsylvania Company, too. It is close to that.

Mr. Bohlen: Your Honor-

The Court: In other words, this is about \$38,000 more than the stock cost the Independence Shares Corporation.

Mr. Shapiro: On that amount, alone.

The Court: Yes, on \$546,000; it is roughly a 7 per cent

mark-up.

Mr. Shapiro: Mr. Geary, I want to ask a question just to understand this. Will you come up a minute, please, and then I am through.

ALFRED H. GEARY, recalled.

Cross-examination (Continued).

By Mr. Shapiro:

- Q. There are approximately 20,000 investors, we will call them, or certificate holders, whatever they are.
 - A. Athink so.
- Q. How many have been sold, approximately, from the time the Securities Commission hearings up until the present time?
 - A. I don't know.
 - Q. Do they run into money?
 - A. Well, you saw the figures, they give you a rough idea.
 - Q. I didn't see the figures.
 - A. Mr. Bohlen just presented them.
 - Q. Are these the figures which show it?
 - A. Yes.

Mr. Shapiro Where is it, Mr. Bohlen?

[fol. 254] Mr. Irwin: That would show what these people are entitled to.

Mr. Shapiro: Let's not confuse it.

By Mr. Shapiro:

- Q. What is there on these figures of Mr. Bohlen which indicates it?
 - A. Down here (indicating).
 - Q. In other words, the full amount-
 - A. Of course, they have only had a few months to pay in.
- Q. The total of sales, then, or purchases since the Securities Commission hearings is \$7700?

Mr. Irwin: Not sales; amount paid in.

Mr. Shapiro: That is what I mean.

By Mr. Shapiro:

Q. That is \$7700, and you have had how many months?

The Court: That is not right; \$7700 plus some \$8500 or \$8600, which represents holdings sold. There must be \$7700 for reinvestment and ninety-nine paid out in cash. They had forty-two stocks and only sold seven.

Mr. Bohlen: We don't arrive at it that way.

The Court: I don't know what the ratio would be.

Mr. Shapiro: It compares with the \$73,000, the percentage of sales—

Mr. Irwin: If your Honor please, I think-

Mr. Shapire: You don't have to have any books here to follow that.

Mr. Irwin: Wait a moment, Mr. Shapiro. If you want that I w'll have Mr. Bonner put on, and go into it. [fol. 255] The Court: You won't do it today.

Mr Geary: Have we a record here?

The Court: Is there somebody who can tell me how many have been sold since June 23, 1938?

Mr. Bonner: I think approximately 600. The Court: And there are 20,000 holders.

Mr. Shapiro: That's right. I say this is a responsibility that now rests on the Court, not on me. I have shown here there are about \$550,000 which is going to be disbursed, and that it is going to be disbursed and create a preference, and it is going to be disbursed and cause a charge of some thirty-eight or forty thousand dollars, which I don't be ieve these people have a right to make against this fund, and if your Honor permits the distribution of that and the distribution of the thirty-eight or forty thousand dollars to this company, I don't know what will be the subsequent determination of this case, and I am sure it is going to create a preference, and I am asking your Honor to issue a restraining order in the matter.

The Court: The responsibility goes further. I am not taking judicial notice of the condition of the stock market in the last few weeks, but we do know there has been a severe decline. If this money among 20,000 plan holders' stock is put into their certificates—or investors, whatever you call them—on Tuesday as of the closing price of Monday they may be much better off if there is any rebound in market conditions than two or three weeks later, or a month, after the matter is disposed of. In the event a receivership is not granted, they will have to come in under a much higher price. That would be very profitable to Independence Shares Corporation at the benefit of the plan holders, inasmuch as the plan holders pay for their securities, in effect, at the pre[fol. 256] vailing prices the day before it goes in the portfolio. Do you fellow me?

Mr. Shapiro: Yes.

The Court: In other words, on Tuesday, the market being low, they will pay less for their securities. If the Independ-

ence Shares Company is held up a month or two and this bill is dismissed, these plan holders will have to pay for this stock at a considerably higher price, and they might make a tremendous profit that would be a loss to these 20,000 plan holders, in turn, whatever the number might be, for which I might be held not legally respon, ble but—

Mr. Shapiro: Let me answer you by saying that proposition can be very easily solved with two suggestions: The first one is so far as the purchase is concerned, we are not concerned about that. I take the view that is merely a turnover, and if they make it, it can't be anything to our detri-

ment, if they buy it for less than they sell it.

I say the Pennsylvania Company should not be permitted to distribute any of this money to the Capital Investment Company or Independence Shares Company on this added price of 7½ per cent—

The Court: In other words, you are discussing what we

will call in round figures \$35,000.

Mr. Shapiro: Yes, and the money they are distributing should be distributed in a cash distribution, because they may create a presumption—

The Court: That \$31,000?

Mr. Shapiro: That is correct. No harm can come to the person who is to get that. If he gets it, he gets it later.

The Court: Then you are in agreement with the Court's statement that they be permitted to reinvest this \$546,000. [fol. 257] Mr. Shapiro: I say there is nothing you can do to stop them without causing more harm, or the possibility of more harm than good. I want the record to show I don't agree that that is the right thing to have done.

The Court: My position is we will not make an order to do it this time. My position is, and I think yours is, we

don't care to interfere.

Mr. Shapiro: Without waiving my right to claim it should be done.

The Court: Because there might be irreparable injury. Frankly, if you did take that position I would require you to put up a bond.

Mr. Shapiro: I wouldn't ask it without putting up a bond.

Since I can't be expected to put it up. I don't ask it.

The Court: The Court is advised that on Tuesday next, or Monday next the Pennsylvania Company, Trustee, proposes in accordance with the terms of these various trust agreements to invest or to purchase securities in the ag-

gregate of some \$546,800, and also make cash disbursements totalling some \$31,000.

Mr. Bohlen: \$32,319.

The Court: \$32,000. In addition to that, they propose to invest some \$7700 under the plan, under some subsequent plan, I don't know the date, but subsequent to May 1st, 1934, and to disburse from \$900.

There is no objection as to the investment of this \$546,800

and the \$7700. Is that correct?

Mr. Shapiro: I don't see how we can interfere with it.

The Court: I just want it on the record that no objection has been raised, I take it, by Mr. Shapiro against the dis-[fol. 258] bursement of \$32,000 in cash, and \$900 in cash; is that correct?

Mr. Shapiro: That is correct.

The Court: Making a total—I think that \$31,000 and \$900 makes \$32,000; that is a total disbursement of \$32,000 in cash, against a disbursement of some \$35,000 or \$36,000

which represents a 71/2 per cent mark-up.

What do you have to say, first, as to the disbursement of \$32,000 in cash? How under the terms of your trust agreement would that affect the company? Would you be in violation of the terms of your trust if you didn't pay it out?

Mr. Bohlen: Yes, your Honor. With each application the so-called investor signs a trust to us to reinvest his distributions at the offered price. He also has a right at any time to instruct us to limit his distribution to it.

The Court: Have you received instructions for the re-

mission of this \$32,000?

Mr. Bohlen: Yes, from the individual certificate holders. The Court: Therefore, there would be a liability on the part of the company if you didn't pay it out.

Mr. Shapiro: Liability for what?

The Court: For failure to carry out the contract:

Mr. Shapiro: The only liability would be they owe the money.

Mr. Bohlen: Wait a minute. I can't see that any other contract certificate holder is harmed, because he has no interest in that.

The Court: That goes to a larger question involved, whether these are individual trusts so that each man stands on his own feet. I am just considering if any order which [fol. 259] the Court will make will cause any irreparable in-

jury to anyone which we could safeguard against if you

were not to distribute this money to the people.

Of course, there is no danger that the position of the Pennsylvania Company will change within the next week or two weeks in the Court's mind, I am satisfied as to that. Therefore, there can't be any harm to those entitled to the money except there may be some of them inconvenienced.

Mr. Bohlen: Your Honor, my thought is there is absolut-ly no other contract certificate holder which is involved in what we distribute from the trust to any particular certificate holder, and also, as far as inconvenience is concerned, a number of contract certificate holders have written in and said in view of the size of this distribution that they could use the money, and would like to have it, and we are bound to pay it to them, and we might have the responsibility for interest. I can't see, your Honor, that any other contract certificate holder would be hurt.

Mr. Shapiro: Picone will be hurt who has this \$2400 he paid in cash, and \$25 a month. If they make an equitable distribution Picone will be hurt, and anybody else who wants to join in the principal.

Mr. Bohlen: If Picone wants to file with us before we invest the money written instructions to pay him his money, we will do it.

Mr. Shapiro: He is suing for the full amount of his money, and he is asking that these assets be protected.

The Court: Can't he get it without projudice?

Mr. Bohlen: I think so, yes.

Mr. Shapiro: In the first place, how do I know he wants it? And he isn't the only one.

[fol. 260] Mr. Bohlen: If Mr. Picone files instructions

with us he will get his money.

The Court: Gentlemen, I do have to go. I am only considering what effect the Court's order will have if an order is made. If it is just a question of some slight inconvenience, it is one thing; if it is a question of some people being seriously inconvenienced by the failure of the Trustee to carry out its obligations, or that the position of the Independence Shares Corporation or the position of the Pennsylvania Company will be seriously affected, that is another. I really don't think it will cause any harm. Are you through with all your testimony?

Mr. Shapiro: Yes, your Honor.

The Court: After the notes of testimony are received I certainly will dispose of this matter at the earliest possible date. In the event I don't dismiss the bill, of course, you are at liberty to go ahead. In the event I don't dismiss the bill the matter will go to a Special Master to consider the matter. That will involve further delay. That would mean in the Court's mind there is a necessity for postponement of any further act, or the carrying out of any further act which might be prejudicial to any of these plan holders. Do you make an application now, Mr. Shapiro?

Mr. Shapiro: I am making an application, for your Honor to enter an order directing the Pennsylvania Company not to pay out the funds which they were about to distribute to the people who are accepting their cash distribution and the

7½ per cent mark-up.

Mr. Irwin: Will your Honor hear me on that point; and the effect on the Independence Shares Corporation?

The Court: Certainly.

[fol. 261] Mr. Irwin: These people own Independence Trust Shares which they purchased. They have money coming to them; that money belongs to them. If your Honor would make an order preventing those plan holders from getting their money it would cause untold harm to our company because it would bring about a breach of the contract between the Pennsylvania Company and the Trustee whereby they wouldn't get the money.

The Court: \$30,000 or \$32,000 distributed among twenty thousand plan holders wouldn't so seriously inconvenience

them, would it?

Mr. Irwin: If it was five hundred, if your Honor please, and if five hundred people would go around and say, "We can't get our money—."

The Court: You mean a hardship to the company, not to

the plan holders.

Mr. Irwin: The hardship would be to our good will, to our good name, because of the fact that this thing was done. If your Honor please, I don't see what warrant there would be for making such an order, and it would do, and I urge upon your Honor that it would do us a lot of harm. It would harm the Pennsylvania Company, a banking institution.

Mr. Bohlen: May I request your Honor to defer this matter until Monday? The money won't be paid out until Monday. I would like to have an opportunity of setting

down on paper my reasons why this should not be done. I really think it is a serious situation.

Mr. Shapiro: I think upon the assurances of counsel that it won't be distributed, we are entitled to have the Court do it.

The Court: Let's get this straight for the record. There is no objection to the reinvestment or the investment of this \$546,800. We will not take any action with respect to the [fol. 262] cash distribution of \$32,000. The Court will direct that of the thirty-five or thirty-six thousand dollars that will be received by the Independence Shares Corporation—we will call it a mark-up for the sake of a better name—that there be no distribution of that fund by the Independence Shares Corporation in any way.

Mr. Shapiro: By the Pennsylvania Company.

The Court: Well, don't you see, they actually pay it over to them. I don't know how you can possibly segregate it.

Mr. Shapiro: The Pennsylvania Company has the money.

The Court: Do you divide it up?

Mr. Bohlen: No.

The Court: I don't want to impose any burden on the company that will make it impossible to carry out their obligations. In other words, do you carry on your books, we will say, ninety-two and a half cents for the stock and seven and a half cents for the company, or do you pay them one hundred cents?

Mr. Bohlen, We pay them one hundred cents.

The Court: And they divide it up?

Mr. Bohlen: Yes.

The Court: The Court is of the opinion there should not be any distribution of the thirty-five or thirty-six thousand dollars which represents this markup to the Independence Shares Corporation, so that you are sufficiently protected. That certainly cannot inconvenience anyone.

Mr. Irwin: If your Honor please, Mr. Geary has asked me to state to your Honor that in so far as this—whatever the [fol. 263] amount may be, your Honor has referred to it as approximately \$35,000, that we do not desire that money on Monday, and if we are not rightfully entitled to it we don't want it.

The Court: When I spoke of it I had in mind the possible difficulties of splitting it up.

Mr. Irwin: Whatever the amount is which is due us out of that, we will try to keep that segregated and keep that in the custody of the Pennsylvania Company until at least we consult with your Honor further.

Mr. Shapiro: I understand there will be no distribution outside of the purchase of the stock until your Honor acts

on the matter on Monday.

Mr. Irwin: On Monday.

The Court: There is only one question left open, the distribution of the \$32,000 in cash. What is the status of this money now? Do you desire to offer any testimony at some other time?

Mr. Irwin: If your Honor please, I would like to advise your Honor on Monday about that after I have had a chance to think this over.

The Court: I will not be available on Tuesday, Wednesday or Thursday. If you want to offer testimony I will hear it on Monday morning.

(Discussion off the record.)

Mr. Irwin: I want to renew my motion to dismiss on the ground that no case has been made out.

The Court: That is understood.

Mr. Irwin: I have made if on the record.

The Court: You have a standing motion to dismiss. This hearing is continued to Monday morning at ten o'clock unless otherwise notified by counsel.

[fol. 264] D. K. PORTEOUS.

Cross-examination.

By Mr. Shapiro:

Q. When was the first time you gave the company advice?
A. What—while I was employed, Mr. Shapiro, on January, 1937, to supervise the portfolio and render investment advice—

By the Court:

Q. January, 1937?

A. Yes.

By Mr. Shapiro:

Q. Did you give them any advice in January to sell any stocks?

A. Definitely no.

. Q. What do you mean by "definitely no"?

A. I am sorry.

Q. What did you mean by that?

- A. No. I will retract that statement. I will just say "no."
- Q. Did you give them advice at any other time in January as a result of which they sold securities?

A. No, sir.

Q. So that the first time you gave them any advice as a result of which they sold securities was this year in April?

The Court: February.
The Witness: February.

By Mr. Shapiro:

Q: What were you paid in 1937 for your services?'

A. Annual retainership fee of \$2400 in 1937.

Q. What was it this year?

A. In 1938 it was \$2400. In 1939 \$2400. Now, M Shapiro, that contract is on file with the S. E. C.

Q. That's all right, I am just trying to get some information. Is that the only compensation you get?

[fol. 265] A. That's the only compensation I get. I have no profit sharing clause—

Q. I didn't ask you whether you have any profit sharing clause, I asked you if you have any other—

A. I am trying to help you.

Q. Please don't:

The Court: Just answer the questions.

By Mr. Shapiro:

Q. Do you get any other compensation of any other kind a from them of any form whatever?

A. No, sir.

Q. Any members—are there any other members of the firm except yourself?

A. Yes.

Q. Do—did any of the members of the firm get any compensation other than what you have told us about?

A. No.

Q. Did you look over their portfolio, did you examine the stocks and the kind of stocks that they had?

A. Continuously, yes.

Q. Were these stocks which you advised them to sell paying dividends?

A. Yes, all of them were paying dividends.

Q. Of course, I assume that, from what you said, you knew something about the nature of this trust arrangement. Did you or didn't you? Particularly, I am interested did you know that this stock, the stocks had to have an earning capacity, at least an increase in their value over a period in order to permit them to mature under the terms of this agreement?

Mr. Irwin: I object to the question.

The Court: Objection overruled and exception.

The Witness: What do you mean, Mr. Shapiro? Explain yourself a little bit better.

Mr. Shapiro: Read the question to him.

[fol. 266] (The question was repeated by the reporter as follows:

"Q. Of course, I assume that, from what you said, you know something about the nature of this trust arrangement. Did you or didn't you? Particularly, I am interested did you know that this stock, the stocks had to have an earning capacity, at least an increase in their value over a period in order to permit them to mature under the terms of this agreement?")

By Mr. Shapiro:

Q. Do you follow that question?

A. Under the terms of the agreement, I don't know what

you mean by "agreement."

Q. They sold investment contracts and at some period or other they had to mature for them to be a successful investment, the investors had to get a maturity value at some time or other, didn't, they?

A. Mr. Shapiro, I know that the investors are participants in common stocks that are held by the Pennsylvania Company. As to any future value? I am not sure. I can't

help you.

By the Court:

Q. You know the purpose of the purchase of the securities, of the trust certificates by the planholders, don't you?

A. The purpose for which the investment—

Q. Let me put it to you this way, they buy it and pay ten dollars a month—

Mr. Shapiro: If I may interrupt, it would be important to you to know whether this gentleman knew about it. I don't object to him being told.

By Mr. Shapiro:

Q. Did you know anything about the plan?

A. I don't hold a plan.

Q. Did you know anything about the plan that these people who employed you were selling? Did you know anything about that plan?

[fol. 267] A. Mr. Irwin—

Q. Won't you answer the question without Mr. Irwin?

Mr. Irwin: If your Honor please, I think it is due this witness to know what Mr. Shapiro is talking about. What plan is he talking about?

Mr. Shapiro: I object. If Mr. Irwin wants to ooject, I

don't object to that, but I object to his speeches.

Mr. Irwin: I am stating my reasons for the objection. The Court: We don't need a life line thrown to this witness. This witness testified under direct examination that he knew it was a limited trust arrangement. If he knew enough about it to give it a name, he knew about the purpose of the plan. Mr. Shapiro is asking him the extent of that knowledge.

Mr. Irwin: I think it is fair to point out that the underlying securities of Independence Trust Shares are entirely

independent of the other plan.

Mr. Shapiro: I object to the statement from counsel.

The Court: I will sustain the objection and direct the witness to answer the question that was put to him by Mr. Shapiro.

The Witness: What was the question? Mr. Shapiro: Read the question to him.

(The question was repeated by the reporter as follows: "Q. Did you know anything about the plan that these

people who employed you were selling? Did you know anything about that plan?")

[fol. 268] The Witness: If Mr. Shapiro now refers to the plan of some witnesses that future values would be thus and so with a definite stated amount at some future date, I must say no.

By Mr. Shapiro:

Q. Who employed you? You are not answering my question.

Mr. Irwin: I object.

The Court: I will continue this hearing for two weeks unless we can proceed in an orderly fashion. I have ruled that the witness must answer the question.

Mr. Irwin: I object unless this witness be given a chance

to answer the question and not be interrupted.

The Court: Your point is well taken on that ground, that he should be given opportunity to answer, but the witness is not making responsive answers. As I said before, in direct examination he said that he knew this was a limited trust arrangement. In order for him to arrive at the conclusion that this was a limited trust arrangement he must have known something about the arrangement. Mr. Shapiro is questioning him as to the extent of his knowledge. He ought to be able to answer it. If he doesn't know, he can say he doesn't know.

The Witness: No, I will say that insofar as my employment is concerned, I was employed by Independence Shares Corporation. I knew that this was a limited management trust in that when the securities were liquidated that no new security could be put in its place, that the proceeds of liquidation were distributed in the form of cash as a principal distribution, or, the proceeds, if the planholder or contract holder or holder of the certificates desired, the proceed could be reinvested in the remaining stocks. Is that your question?

[fol. 269]. By Mr. Shapiro:

Q. Have you finished the answer?

A. Well, I don't know if I have finished the answer, but when the Judge states that I knew something of the plan, I want to elaborate as to what I knew of the plan and my

connection with it. I think that takes up all of my personal connection and employment.

Q. Are you through?

The Court: Apparently. Go ahead, ask your next question.

Mr. Shapiro: I don't want to be accused of interrupting him.

The Witness: Well, ask a question and see if I am through.

By Mr. Shapiro:

Q. Mr. Porteous, did you know what was to be done eventually with this stock after the money was reinvested? For instance, in this very case you advised the sale. There were proceeds. Some were distributed in cash and the balance reinvested. What was to eventually to become of that, do you know?

A. Why, the balance would be reinvested in the remain-

ing securities.

Q. Do you know for what purpose, for what eventual purpose?

A. Why, certainly, for the purpose of employment in

these securities. Well, that is the answer.

Q. With what end in view? How long was this investment to go on, did you know. Did you know how long this investment and reinvestment was to go on in this limited number of securities? Did you know that?

A. Well, I knew that the investment was to be—when I was employed, Mr. Shapiro, there were forty-two stocks

in the portfolio—.

A. That is not answering my question.

[fol. 270] A. I am trying to get to the question. If we recommend the sale of seven stocks, and if seven stocks are eliminated, I know that those people who elect, instead of taking the principal cash themselves, to have the Pennsylvania Company direct reinvestment of the proceeds in other securities, it would mean thirty-five other securities would be in the vehicle for the principal distribution. Does that answer your question?

Q. Did you know what was the eventual purpose of reinvesting that in the remaining thirty-five securities insofar as the contract holder was concerned? What was the ulti-

mate purpose?

A. That is the ultimate purpose.

Q. What was that?

A. The investment in thirty-five securities.

Q. To what end? For how long? Did you know?

A. I don't know.

Q. You didn't know?

A. No.

Q. Well, if you don't know, say so.

A. I would like-

Q. You don't know. Is that the answer? You didn't know? He shook his head "Yes." I would like the record to show that. Were you told what stocks to pick out for the sale when you were employed in February at first?

A. I would like to go back to that "No," I would like to go back and say yes, I knew that the proceeds would go

into the thirty-five stocks.

Q. You have already said that.

A. All right.

Q. I am asking you the question whether you knew how long?

A. Nobody knows how long.

Q. Did you know how long that was to continue?

A. What?

Q. The reinvestment of the stock, or investment in these thirty-five shares.

[fol. 271] A. Nobody knows.

Q. Did you know?

A. No.

Q. All right. Were you told in February which stocks you should pick out for sale, or was that left to you to decide which stocks were to be sold?

A. Mr. Shapiro. I am employed as investment counsel, if you please, I am employed to give orders, I am employed to make my recommendation.

Q. Won't you answer my question?

A. I was not told which stocks to select.

Q. You did your own selecting?

A. The firm of Porteous and Company, Incorporated, did its own selecting.

Q. What were the dividends that were paid on the five stocks that were sold? What dividend did the Bankers Trust Company pay?

A. I would rather not make it oral, I would have to refer

to the records.

3

Q. Go ahead.

A. There are 40,000 common stocks available. I can't

The Court: Refresh your recollection.

By Mr. Shapiro:

Q. Refer to your records, on the Bankers Trust Company.

The Court: He said a moment ago that the Pennsylvania Company directed the reinvestment. Was that your understanding?

The Witness: Yes, those orders were given by the Pennsylvania Company upon advice from the Independence Shares Corporation to a brokerage firm to reinvest the proceeds. That is my understanding.

By Mr. Shapiro:

Q. I want to ask a question.

A. Two dollars a share in 1938.

[fol. 272] Q. Going back to his Honor's question for a moment, you understood that Independence directed some broker to buy certain stocks?

A. Definitaly.no.

Q. Who was told to buy the stock?

A. Independence Shares Corporation directed the Pennsylvania Company, the trustee—

Mr. Bohlen: If your Honor please-

Mr. Shapiro: Pardon me-

Mr. Bohlen: May I say something here?

Mr. Shapiro: Is it an objection?

Mr. Bohlen: Yes, I object.

Mr. Shapiro: Will your Honor rule?

The Court: I will overrule the objection. The witness made a statement. I would like to have it clarified. If that statement is not in agreement with your own thought in the matter, we will allow you to make a statement, since you represent the Pennsylvania Company.

Mr. Shapiro: Will you answer the question? Will you

read the question to him?

(The question was repeated by the reporter as follows:

"Q. Going back to his Honor's question for a moment, you understood that Independence directed some broker to buy certain stocks?

A. Definitely no.

Q. Who was told to buy the stock?")

A. My understanding is that the Pennsylvania Company directs the broker to utilize the proceeds.

By Mr. Shapiro:

Q. The Pennsylvania Company directs whom?

A. If you don't mind, Mr. Shapiro, I am not employed for that phase of the business.

[fol. 273] Mr. Bohlen: Your Honor, may I-

Mr. Shapiro: Par lon me-

The Witness: It is unfair to ask me as to the gymnastics and mechanics because I am not employed for that phase of the business.

By Mr. Shapiro:

Q. Do you know anything about it or not?

Mr. Bohlen: I make a motion to strike off the answer because the witness is talking about something done by other parties.

Mr. Shapiro: That he knows nothing about. Mr. Bohlen: That he knows nothing about.

Mr. Shapiro: If that is the statement of Mr. Bohlen and Mr. Irwin agrees to it, I join in the motion and ask that the previous answer be stricken out, and I move that any statement he made about that be stricken out.

The Court: Do you concur with Mr. Bohlen's statement? Mr. Irwin: I believe any testimony of Mr. Porteous concerning the arrangement between the Pennsylvania Company and Independence Shares Corporation may be stricken out because I frankly don't think he knows very much about it and he has so said.

The Court: Strike it out.

By Mr. Shapiro:

Q. Now, Mr. Porteous, you said two dollars a share was paid by the Bankers Trust?

A. Yes.

Q. What was the dividend on the Borden Company, what dividend were they paying?

[fol. 274] A. \$1.40. \$1.60 in 1937 and \$1.40 in 1938. The dividend was reduced in the course of the calendar year of 1938. The dividend amount was \$1.40.

Q. Will you go back to the Bankers Trust and tell me what was the selling price of that—the market price at the time you suggested or advised the sale of it? Is there

anything in your records to show that?

A. No.

Q. Do you know what it was?

A. No.

Q. You don't know. Was it discussed in your letter at all, the price?

A. Well, the current values were mentioned.

Q. Won't you look at your records?

A. The current values

Q. Won't you look at your letter and see whether the price at that time is discussed in your letter?

A. I can hear you all right.

Q. If you would only let me finish you would probably hear me better.

A. The actual price is not mentioned in the letter.

Q. Is the yield of that stock discussed in your letter?

A. The yield of that stock is not discussed in the letter.

Q. Is the same true of the Borden Company, is the price

and yield in your letter?

A. The actual price and yield are not mentioned. I would like to put into this record at this time my letter of February 6th shows the particular prices other than the actual transactions which occurred, and with the fluctuations in the market, I did not put in the yield or actual market prices in this letter, merely referring to current values.

Q. Consolidated Edison Company of New York, what was the dividend that stock was paying?

A. Would you go back to the Borden Company for a second?

Q. I am through with it. If you have something to say about it, you can say so.

[fol. 275] A. Did you mean the yield at the beginning of 1938 or at the end of 1938?

Q. I mean at the time you wrote that letter. If there is anything in your letter as of the date of that letter show-

ing what was the market price of the Bankers Trust or Borden and Company, and what was the yield to the investor who owned it.

A. The specific price and definite yields are not mentioned in this letter. They were discussed at the board of directors' meeting but not mentioned in the letter.

Q. Consolidated Edison Company of New York, do you

have in the letter the dividend it paid?

A. Yes.

Q. What was it?

A. \$2. \$4 in 1932 and \$2 in-

Q. Won't you answer my question?

Mr. Irwin: If your Honor please-

By Mr. Shapiro

Q. I asked you the dividend it was paying at the time you wrote the letter.

A. I have never been on the witness stand before.

The Court: All you have to do is to answer the question. If you don't understand the questions, say so, and they will be clarified in your mind. If you have something you want to add to your answer in addition to answering the questions "Yes" or "No," you may do so.

The Witness: What was the question?

By Mr. Shapiro;

Q. What was the dividend paid by Consolidated Edison Company of New York at the time you wrote that letter?

A. \$2 per share per annum.

Q. You don't have the price in that letter of the stock at that time, the market price?

[fol. 276] A. The actual market price as of the date of the writing of the letter is not here. However, the market price—

.Q. You have answered my question. You said you were never on the witness stand—

A. I want to qualify it.

By the Court:

Q. Was the price in your lefter?. In other words, what he wants to know is what information was placed at the

disposal of the committee of the Independence Shares Corporation.

Mr. Shapiro: In that letter. The Court: In that letter.

The Witness: Well, Judge, if I might say, if I were to write about Consolidated Edison and make it specific and definite, I could probably write volumes.

By the Court:

Q. You did or did not do certain things. In your letter you gave the price of this stock, the prevailing market price and the dividend and the yield, or you didn't. You said that information was not given in the letter in connection with the stocks, but you did mention it at the meeting. It is a simple enough question, and it is not what reasons prompted you to do a certain thing, that is not being asked you, you are being asked as to what information was in the letter.

A. All right. That information was not in the letter.

By Mr. Shapiro:

Q. National Biscuit Company. At the time you wrote that letter what dividend was it paying?

A. \$1.60 a share.

Q. Do you have the price of that stock at that time in your letter?

A. No, sir.

Q. The New York Trust Company, at the time you wrote that letter, what dividend was it paying?

[fol. 277] A. \$5 a share.

Q. Do you have the price in the letter?

A. No, sir.

Q. And the Philadelphia National Bank, what dividend was it paying?

A. \$5.

Q. Do you have the price in your letter?

A. No, sir.

Q. The Security National Bank, what dividend was it paying?

A. An irregular dividend which amounted to \$2.25 in the calendar year 1938.

Q. Do you know the price at that time, is it in your letter, I mean?

A. No, it is not in the letter.

Q. Do you know what price—what dividend the Atchison, Topeka and Santa Fe Railway Company was paying at the time you wrote the letter?

A. Say that again?

Q. Do you know the dividend the Atchison, Topeka and -

Santa Fe Railway Company was paying?

A. If your Honor please, it is an ambiguous question because it paid no dividend. I can say there was no dividend being paid.

Q. That is the answer.

A. You asked me what dividend was being paid.

The Court: Let us not argue about it.

By Mr. Shapiro:

Q. The answer is there was no dividend paid, is that right? Did you know that this company paid \$122,000 for this stock and that at the time you wrote that letter, at or about the time you wrote the letter the stock was at a value of only \$60,000 on the market? Did you know that?

A. Yes.

- *Q. Did you know how long there had been no dividend paid by the Atchison, Topeka and Santa Fe Railway? For how long hasn't a dividend been paid?

 [fol. 278] A. A dividend was paid in 1937 but none in 1938.
 - Q. Do you know whether there was any paid in 1936?

A. I haven't the records with me.

Q. Did you know whether the bonds were in default in 1938 and 1937 interest on the bonds or payment of principal of the bonds?

A. I have those records in my office.

Q. This book you have given us will cover that, will tell us whether the bonds were in default?

A. It doesn't show that.

Q. Don't you know of your own experience in your brokerage houses, you were acting as investment counsel, don't you know that the bonds of that railroad were in default?

Mr. Irwin: I object to this classifying the brokerage houses with this man's business. This man's advice came to us as investment counsel.

The Court: Strike out that part of the question.

By Mr. Shapiro:

Q. As investment counsel don't you keep yourself familiar with the condition of the stocks on the market?

A Yes, sir.

Mr Arwin: If your Honor please, I submit that that is not fair cross-examination because your Honor knows and Mr. Shapiro knows that nobody can keep in his head the records of the thousands of securities that are listed on the New York Stock Exchange, and all of the bonds and stocks. The Court: This witness can make that reply.

By Mr. Shapiro:

Q. Do you or don't you?

A. What was the question, please?

(The question was repeated by the reporter as follows:

[fol. 279] "Q. As investment counsel don't you keep yourself familiar with the condition of the stocks on the market?")

The Witness: Yes, and I knew that income bonds of Atchison were not paying interest. They were income bonds, however. I also knew that the Atchison mortgage bonds were considered of high class.

By Mr. Shapiro:

Q. Were they paying interest?

A. Yes.

Q. You did know that?

A. Yes.

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Q. Do you know what the Manhattan Company is?

A. Yes, sir.

Q. What is it, a bank?

A. It is the Bank of Manhattan Company.

Q. Was it paying dividends in February, 1938!

A. I don't know the exact month, sir.

Q. All right, when you wrote that letter?

A. That was February, 1939.

Q. Was it paying dividends?

A. Well, now, that is not from an investment viewpoint, I wouldn't want to put it that way. I think I can say dividends will be paid quarterly in 1939.

Q. I didn't ask you that, I asked you whether at the time you wrote this letter you know whether Manhattan Company was paying dividends too?

A. The Manhattan Company was paying dividends.

- Q. I am putting my question my way, Mr. Porteous, not yours. My question is in 1939, February, when you wrote the letter which you have been using, and which counsel has offered in evidence, was the Manhattan Company paying dividends or not?
 - A. The Manhattan Company was paying a dividend.

Q. How much?

A. I do not recall. I believe it was thirty-seven and a half cents quarterly, but I wouldn't guarantee that statement.

[fol. 280] Q. How much quarterly?

WA. I believe it was thirty-seven and one-half cents, but I wouldn't guarantee that statement. It may be reduced from thirty-seven and one-half cents.

- Q. Do you have anywhere any papers showing your review of this portfolio and what notations you made with regard to each one of these stocks before you wrote this letter of February, 1939?
 - A. I don't have such records with me.
 - Q. Do you have such records?

A. Certainly.

Q. I mean that you made. Specifically, when I say that I am assuming that when you wrote the letter or before you wrote the letter you went over all these stocks and analyzed their situation as to dividends and as to earnings and as to default or condition of bonds and obligations, and then you gave your opinion on the four or five stocks?

A. That's right.

Q. That's right, is it?

A. Yes.

By the Court

Q. Definitely, did you make an analysis of each and every stock of the portfolio of the trust certificates?

A. Yes, your Honor, that is a rather continuous process job. I wouldn't say that you could say on February 6th all forty-two stocks had been analyzed.

Q. Approximately, I don't mean that very day. You did make an analysis with regard to the facts Mr. Shapiro mentioned and with regard to the position of the respective stocks in the field?

A. Yes.

Q. Their prospects, and so forth

A. Yes.

Q. You did go over these stocks?

A. Yes.

A. Fes.

By Mr. Shapiro:

Q. You did?

[fol. 281] The Court: He said he did.

Mr. Shapiro: He said he did, did you say?
- The Court: Yes, he said he did.

By Mr. Shapiro:

Q. Why did you just pick out those five stocks in the letter to write about?

A. You mean seven, don't you?

Q. Seven, whatever it was.

A. Because they didn't measure—

Q. I see, your memory is good. What did you say? A. It's my business, I ought to know.

The Court: You are getting away from the subject.

By Mr. Shapiro:

Q. Why did you pick out those seven stocks?

A. For the reasons incorporated in this letter and briefly discussed before the Court.

Q. And what was that?

The Court: Briefly discussed before the Court.

By Mr. Shapiro:

Q. Why did you pick those seven? Why did you tell them to sell Philadelphia National Bank which showed a profit of over \$5000 and was paying \$5 dividend and not to sell the Manhattan Company which showed a loss of \$30,000, more than 50 per cent of its value? Why did you do that?

A. I think it has been gone over.

Q. No, it has not.

A. It has.

Q. You answer the question.

Mr. Irwin: Answer the question. The Witness: I am not referring to theMr. Irwin: Answer the question.

[fol. 282] The Witness: The answer is that the Philadelphia National Bank has only 15.5 per cent in commercial loans and discounts as of December 31, 1938, that the management, while it is of the highest class and outstanding in reputation, is not, in our opinion aggressive and progressive, and is not seeking new outlets—

Mr. Shapiro: Mr. Porteous-The Court: Let him finish.

By Mr. Shapiro:

Q. I thought you were through, that's why I wait a long time, I am waiting for you to get through. I am listening to you.

A. Your Honor, if you don't mind, I am discussing this

because I was asked.

The Court: Mr. Irwi wants you to complete your statement.

The Witness: The management of the Philadelphia National Bank is apparently not seeking outlets for its money through a personal loan department or through the financing of automobile paper or through the financing of—

Mr. Shapiro: Go ahead, I am listening.

The Witness: -five year insurance plans, and the current trend in banking in having a large number of smaller accounts on which service charges can be assessed finds the Philadelphia National Bank in an inadequate position to benefit by this current trend in banking. Furthermore, the Philadelphia National Bank has an excessive amount of cash idle, unproductive, and has, according to the standards of Porteous and Company, too large a proportion in Government bonds. A market trend downward in Government bonds occurred at one time when the United States liberty loan bonds where one of the issues sold at 82. Such a decline [fol. 283] in Government bonds would seriously impair the capital of the institution and certainly seriously impair both the dividend and the principal as represented by the price of the stock. It was prior to such possibilities that the sale was recommended.

By Mr. Shapiro:

Q. Is the Manhattan Company called the Manhattan Bank or the Bank of Manhattan?

A. Yes, sir.

Q. Didn't you know at the time you recommended the sale of the Philadelphia National Bank it had shown a profit, as against the Manhattan Company, and that the Philadelphia National Bank was paying approximately 5 per cent dividend on the then market value of its stock?

· A. Yes, I knew that.

Q. You did. Did you know what the Manhattan Bank was paying? You said Manhattan was paying a dividend. Did you know what it was paying?

The Court: He said to the best of his recollection it was thirty-seven and one-half cents.

The Witness: To the best of my recollection it reduced the dividend. I could look it up.

By Mr. Shapiro:

Q. Will you do that please? Show me when it reduced its dividend and what it was paying.

A. The rate was reduced to eight cents annually during

the course of the calendar year 1938.

Q. Eighty cents:

A. Annual during the course of 1938.

Q. What did the price range go in 1938?

A. Sir?

Q. What did the price range go in 1938?

A. In 1938?

Q. Yes.

A. I don't have it in these records, but I can supply it.

Q. I wish you would.

[fol. 284] A. Twenty-four was high and the low was thirteen and a half.

Q. Twenty-four was high and the low was thirteen. Do you have the last quotation on it?

A. No, I don't.

Q. That is in one year.

A. The last quotation is somewhere around about that. It was in the year 1938, yes.

Q. I have here about fifteen.

A. That's about correct.

Q. How about Philadelphia National Bank, can you give me the price range in the last year? We are talking about 1938, I suppose, aren we?

A. Yes sir. 1071/2.

Q. Was what?

A. High in 1938.

Q. What was the low in 1938?

A. 93.

Q. What was that?

A. 93.

Q. Selling today at 105, isn't it, 102 to 105?

A. You should have warned me about this. 102½ was the bid price.

Q. 105 is the asked, 1051/2?

By the Court:

Q. What is the asked price, Mr. Porteous 1

A. He gave it.

By Mr. Shapiro:

Q. Is that correct, 1051/2?

A. I have 1061/2 in this paper.

Q. 1061/2. All right.

A. Mr. Shapiro, the printed prices are not correct. They are a wide approximation.

Q. We will not argue about one dollar, it's unimportant.

A. That's why I didn't correct you on your 6½.

[fol. 285] Q. I know why you didn't correct me. Bankers

Trust Company, what dividend do they pay?

A. At present, \$2.

Q. \$2. The price is around \$50 a share?

A. 50½ bid.

Q. That is 4 per cent. investment, approximately?

A. Mr. Shapiro, I can't agree to that.

Q. Is it or not? You can figure it.

A. I refuse to answer that.

Q. Do you?

A. Yes, I do.

Q. That's all right, I am satisfied.

A. Because it is a bond, a high class bond with a maturity date near by.

Q. Is there anything the matter with Bankers Frust Company, anything wrong with it, let us put it that way?

A. You mean termites in the building?

Q. Is it an insecure investment? Is it an insecure investment?

The Witness: What does he mean?

The Court: I don't know. I thought you were talking about the bank.

Mr. Shapiro: Yes, the bank.

The Court: You spoke about it a moment ago.

The Witness: If I said "insecure" I might be sued for causing a run on the bank.

Mr. Shapiro: You can't be sued.

The Court: The question was asked as to the yield. I am going to take judicial notice of the fact that \$2 is about 4 per cent.

Mr. Shapiro: I want to say that I am asking these questions deliberately so that your Honor knows how this witness answers. I have no secrets about this.

[fol. 286] Mr. Irwin: I think I should protest against statements like that from Mr. Shapiro because this witness has been very frank and fair.

The Court: I think I have said one hundred times during the last week that you are not before a jury and I am not very impressionable when it come to remarks of counsel Mr. Shapiro: I think my remark is perfectly proper.

The Court: That goes for both.

The Witness: You made the comment that you were taking judicial notice of the fact-

The Court: That \$2 is 4 per cent. of fifty.

The Witness: From an investment standpoint, I want to volunteer this information-

Mr. Shapiro: I object to his volunteering any information.

The Court: I will sustain the objection. It really isn't important.

The Witness: But I must say that it goes to the heart of the proposition.

The Court: We will hear the explanation.

Mr. Shapiro: Will you grant me an exception?

The Witness: The performance of a principal on a bond is of greater importance in value than the current income under a trend.

The Court: I understand there are other factors in making investments.

The Witness: May I inquire of the Court what happened to the people who bought Borden on a yield basis in 1932? It has a price today, but the dividend is half.

[fol. 287] The Court: Mr. Porteous, I want to say that I am aware of the fact that there are other considerations than that of yield in making investments:

By Mr. Shapiro:

Q. Mr. Porteous, what was the dividend by the Aetna Life Insurance Company of Hartford in 1938?

A. I don't have those records.

Q. What did you say?

A. I don't have those records with me.

Q. You don't have those records with you in court. What was the dividend paid by the First National Bank of Boston?

A. I don't have those records.

Q. What was the dividend paid by the Home Insurance Company?

A. The records are not bere.

Q. What was the dividend paid by the Insurance Company of North America of Philadelphia?

A. I don't have the records in court.

Q. Don't you have any of those records prepared-

A. Well-

Q. Wait until I finish, please. Don't you have any of those records prepared so that when this matter was discussed before the board of directors you could give them the information they would ask at that time as between the things you recommended and the rest of the portfolio? The stocks you recommended for sale and the rest of the portfolio?

A. Yes, those records were available at that time. You are referring not to the letter but to the February 17 board of directors meeting?

Q. I am referring to the date you wrote that letter. I want to know why you picked out those seven stocks out of a clear sky and suggested their sale?

The Court: Well, we will strike "out of a clear sky."

[fol. 288] By Mr. Shapiro:

Q. Without making a comparison with the others?

A. Mr. Shapiro, that letter was written—in answering your question—that letter was written after considerable thought and study of all available records and the application of current economic and business trends, and those

records were at hand when the letter of February 6 was dictated. If we had included the current position of all forty-two companies at that time the letter would have been so extensive that frankly I would have wanted a larger retainership fee; but the information was there and available. The information was considered at the time of the writing of the letter of February 6.

By Mr. Shapiro:

Q. It was where? Where was it available?

A. At our office in New York City where the letter was composed and written.

Q. Available to you?

A. Available to the client and to Porteous and Company.

Q. But it was in your office in New York City?

A. Right. They were in Philadelphia, and we were in New York.

Q. Why did you write this letter of February 6, 1939?

A. I wrote that letter of February 6, 1939 in the interest of the certificate holders, contract holders and planholders of Independence Shares.

Q. Who told you to write the letter?

A. Douglas K. Porteous told me to write that letter.

Mr. Shapiro: Maybe this witness thinks this is funny, if your Honor please, but I don't. I asked him who told him to write the letter.

By Mr. Shapiro:

Q. Will you answer the question? Who told you?

A. My own conscience, my own study, my own matured judgment. I am an old man, investment wise. I have lived with studies—

[fol. 289] Q. Will you answer my question? Who told you?

The Court: He said he did it of his own volition. That is what the answer means.

Mr. Shakiro: I don't know who Douglas K. Porteous is. The Witness: The records will indicate that is the party on the witness stand.

By Mr. Shapiro:

Q. Nobody suggested the writing of the letter except yourself?

A. Yes.

Q. Have you any other letters like this you wrote when your conscience prompted you to tell Independence Shares how you felt about it during the previous years you were receiving the \$2400?

A. It is not available in court.

Q. Did you write such a letter?

A. Recommending liquidation of securities?

Q. Yes.

A. I correspond with them quite a bit.

Q. Did you write such a letter?

A. No.

Q. This, I take it, is the only letter of its kind you wrote, moved by your conscience, to tell these people—I am serious about this, Mr. Porteous and your laughing interrupts me—did you write any other letters which your conscience prompted you to write about the portfolio that this company had?

A. Of my own volition, a letter of that type had not previously been written. That is the only letter of this type

that was written.

Q. Have you any letter that was written not of your own volition but at the request of the company which employed you?

A. No other letters were written at the request of the

company which employed me.

[fol. 290] Mr. Shapiro: May I have a copy of the minutes of the meeting that was held in connection with this matter?

Mr. Irwin: It is one of the exhibits. It is Exhibit 32, I

think.

Mr. Shapiro: I notice in these minutes, Mr. Irwin, that reports were secured from the Argus Research Corporation and J. H. Brooks and Company and Auchincloss, Parker and Redpath. Are those available here today?

Mr. Irwin: I think we have them.

By Mr. Shapiro:

Q. Would you say the bank stocks were less speculative than the other stocks in the portfolio of the people who employed you?

A. Am I required to answer that question?

Mr. Irwin: Answer the question and qualify it in any way you want.

Mr. Shapiro: Your Honor, you are asked by this witness

whether he is required to answer that question.

Mr. Irwin: I object to it because it is an unfair characterization. You are asking the witness to assume that the stocks are speculative when you ask that question.

The Court: I will overrule the objection and grant you an exception and direct that the question be answered.

The Witness: Bank stocks recommended for liquidation are less speculative than the remaining stocks in the portfolio, in the opinion of investment counsel. They are, however, not as desirable investments for future holding as the remaining securities in the portfolio, in the opinion of investment counsel.

[fol. 291] By Mr. Shapiro:

Q. Were you acquainted with the letter of Auchincloss, Parker and Redpath? Did you know when you went to that meeting that these opinions had been asked from these

various people?

A. Mr. Shapiro, the first time I saw the letter that you have there was at this board of directors' meeting, and I do not recall whether I had been advised in the long distance telephone conversation prior to February 17, if so, only one or two days prior to that, that other independent investment counsel groups had recommended the disposal of a larger number of stocks than Porteous and Company recommended.

Q. You have not answered my question, have you? I asked you whether you knew that the information or advice of Auchincloss, Parker and Redpath had been requested on this archivet method.

this subject matter?

Mr. Irwin: If your Honor please, I submit the witness has answered that question. He said he doesn't know whether he was advised two or three days before this meeting. He first saw the letter that day.

The Court: You want to know whether he knew at the

time, of the contents of that letter?

Mr. Shapiro: I have asked him a simple question.
The Witness: I think I can answer your question.

Mr. Shapiro: Will you please allow me to finish my discussion with the Court? You will remember this witness said he attended a meeting of the board of directors. I want to know whether he knows that this information was

requested from Auchineloss, Parker and Redpath, and that's all I want to know, and I think I have a right to know that.

The Court: You can answer that "Yes" or "No" and then if you want to add anything to it, you may. Did you or didn't you know that?

[fol. 292] The Witness: I did not know prior to February 15 that this information had been requested.

By the Court:

- Q. When did you first learn of it if you ever learned of it?
 - A. I am not positive.

Q. You don't know whether you ever learned it?

A. I learned it on February 17 or in the two days prior to February 17.

By Mr. Shapiro:

. .

- Q. My question was—I am going to repeat it again. Did you know when you attended the meeting of the board of directors that a request had been made to Auchincloss, Parker and Redpath for their advice on this very subject matter?
 - A. Yes.
- Q. Did you know that when the meeting was held the adavice had already been received? Did you know that?
 - A. Yes.
- Q. So that this statement in the minutes of February 20 that other investment counsel service should be obtained for comparison purposes refers to a report already received, is that right? Just a minute, Mr. Irwin, I am examining this witness.
- Mr. Irwin: You are examining him about a board of directors meeting when that started on the 15, 16 and 17.

Mr. Shapiro: May I continue to examine?

The Court: Go ahead.

The Witness: I knew on the 17th that other advice had been obtained. As to whether or not I was fully aware of all of the various sources of additional advice I am not qualified to say.

By Mr. Shapiro:

Q. I only asked you about this phase. Did you know in that letter which is dated February 17th—this meeting was

[fol. 293] held on the 20th of February—did you know that in that letter that they said the following:

"Consideration might be given to the possible liquidation of Manhattan Company and National City Bank in place of the Security National Bank of Los Angeles for the present ""

Did you know that?

A. Yes.

Q. You did know that?

A. Yes, I did know that.

Q. All right. Now, did you know that in their letter, or, rather, did you know that they were only requested not to give information as to which of the stocks in the portfolio should be sold, but whether or not, National Biscuit, Borden Company, Consolidated Edison, Bankers Trust Company and the others listed should be sold? Did you know that?

A. I would like to refresh my memory by reading the

first page of the letter. .

Q. "In response to your request we are pleased to write you concerning suggestions which have been made for the elimination of certain securities from the Trust. The securities suggested are listed below: National Biscuit, Borden Company, Consolidated Edison of New York, Bankers Trust Company of New York, New York Trust Company, Security First National of Los Angeles and Philadelphia National Bank."

A. Yes.

Q. Did you know that? Is that true of all the others whose opinion was requested?

A. I am not competent to say that, I am not a principal

of Independent Shares. I don't know.

Q. You were there.

The Court: He says he doesn't know.

By Mr. Shapiro:

.Q. You don't know?

A. No.

[fol. 294] Q. All right. If it had been discussed at the meeting of February 20 you would have known it?

Mr. Irwin: I think Mr. Shapiro is referring to the meeting of February 20, and I don't believe that is the date of

the meeting, is it? February 20—February 23; February 22.

The Court: It doesn't make much difference,

Mr. Shapiro: I said February 20.

The Court: Yes, you did. Mr. Irwin: I was wrong.

By Mr. Shapiro:

Q. Did you know that Harold B. Dorsey, president of the Argus Research Corporation said in his letter which was also restricted to the information requested,

"It may be none of our business, but it seems to us that your representation in the Oil Industry is relatively heavy."

A. Yes, I knew that.

Q: "After the above stocks have been eliminated, five out of the remaining thirty-five issues will be oils which will be heavier than any other individual group except the bank and insurance category; consequently if you are considering eliminating other issues, I would suggest that you consider Atlantic Refining. As you probably know, the crude oil statistical position is strong and the finished oil products' position relatively weak. This condition suggests difficulty in improving the profit margin of the refiner and marketer, which of course directly applies to Atlantic Refining."

A. Is that a question?

Q. Yes. Did you know that?

A. Yes, I did know that. .

Q. So that I am correct in understanding that the question asked of these independent companies whose names I [fol. 295] read was "Would you advise that we dispose of these securities," naming the seven securities that we have discussed?

A. Mr. Shapiro, your Honor, I am an outside person, insofar as Independence Shares Corporation is concerned. I believe that counsel's question really should be to somebody in Independence Shares Corporation. I know that they obtained all sorts of outside advice—

Q. Did you read it?

A. As to what basis they sought it, I believe that is Independence Shares Corporation's business.

Q. Will you answer my question?

A. I am not able to answer your question.

Q. You did know that they had sought advice?

A. Yes.

The Court: That is apparent.

By Mr. Shapiro:

Q. Did you read the advice that they got?

A. Not entirely, and I don't know, Mr. Shapiro, that I saw all the advice that they obtained.

Q. I see.

A. If you don't mind, Mr. Shapiro, when this meeting was in progress—

Q. I am listening, go ahead.

A. When his meeting was in progress I excused myself once or twice and they were discussing advice from other houses, because I didn't think, in my capacity, I should be at certain discussions.

Q. Don't you think you ought to know-

The Court: Regardless of whether or not he does, he wasn't there. He may be wrong in absenting himself, but it was what he did.

By Mr. Shapiro:

Q. Don't you think, you as their adviser, should listen to the opinion of others in the same line of business? [fol. 296] A. Yes, I do, and I did listen to the opinion of others, but I am not certain as to whether I listened to the advice that was obtained from all sources.

Mr. Shapiro: Has anybody got the J. H. Brooks letter? that is the same as the other.

Mr. Irwin: Argus, I think is the same as Brooks.

By Mr. Shapiro:

Q. Didn't the Auchineloss letter say that the Philadelphia National Bank stock was considered a very good holding?

A. Was that all they had to say about it?

Q. "But its market price is so high that it would be difficult to make up a combination of substitutions for this issue." Did you know they said that?

A. Your Honor, I knew they said that but I don't see any

objection to it.

By the Court:

Q. Do you agree or disagree with it?

By Mr. Shapiro:

Q. Did you know they said, "The Security First National Bank of Los Angeles, on the basis of published statements shows a comparatively high rate of earning power as well as dividend payments in relation to market price."?

A. Yes.

- Q. Did you know that they said "It is assumed that there is probably some specific reason for the recommendation to liquidate this issue outside of the information which might be gleaned from public reports"? Did you know they said that?
- A. Yes. Your Honor, if I might interrupt at this particular moment, I want to say for the record that investment analysts and investment counselors often disagree.

The Court: Yes, of course. That's what makes horse races.

[fol. 297] By Mr. Shapiro:

Q. Were you consulted about the elimination-

The Court: We will take a recess until 1:30.

(Recess from 12:30 o'clock P. M. to 1:30 o'clock P. M.)

After Recess

Present: Counsel as before noted.

Douglas K. Porteous, recalled.

Cross-examination (Continued).

By Mr. Shapiro:

Q. Mr. Porteous, as investment counsel for this company, Independence Shares Corporation, I suppose you know that between February, 1938, and August, 1938, there had been an increase in the portfolio by 361 shares of each of the stocks, 42 stocks.

A. I knew there had been an increase, but I didn't know the exact amounts, sir.

Q. All right. Did you advise them in connection with that at all?

A. No.

Q. Do you know notwithstanding the fact that, for instance, the Atchison, Topeka and Santa Fe Railway in 1938 had not paid its dividend and defaulted in some bond that you referred to—notwithstanding that fact, they bought 361 shares of that stock?

A. I am aware that they increased their participation

in the Atchison stock.

Q. You were not asked at that time about continuing to buy Atchison, Topeka and Santa Fe Railway, notwithstanding the fact that they were in the condition that I have just referred to?

Mr. Irwin: If your Honor please, I object on this ground: We had no right to change these securities; we were selling [fol, 298] Independence Trust shares secured by 42 stocks. Unless the stock was eliminated from the portfolio entirely we couldn't come along with the next lot of Independence Trust shares and buy 41 stocks. As your Honor can well understand, under our indenture of trust those stocks were there until eliminated.

The Court: He simply asked him whether or not he advised them in connection with the purchase of stocks or bonds, whatever it may be.

Mr. Shapiro: I suggest they had as much right to sell

this one stock as the others.

The Court: That is all a matter of argument. The Witness: What is the question, please?

Mr. Shaniro: Read the question to him.

Mr. Shapiro: Read the question to him.

(The question was repeated by the reporter as follows: "Q. You were not asked at that time about continuing to buy Atchison, Topeka and Santa Fe Railway, notwithstanding the fact that they were in the condition that I have just referred to?")

A. My employment, my relationship with Independence Shares Corporation necessarily brings me the knowledge that incoming dollars will be awarded at that time as referred to by Mr. Shapiro, being placed proportionately into 42 common stocks, and I knew between those dates that you mentioned that additional moneys would be going into Atchison, Topeka and Santa Fe.

Mr. Shapiro: Will you read the question to the witness?

By the Court:

Q. Let's save time. Were you consulted with regard to that? Were you consulted with respect to the additional purchase of Atchison, Topeka and Santa Fe? Yes or no, were you consulted?

A. Yes.

[fol. 299] By Mr. Shapiro:

Q. You were consulted. Did you advise the purchase of more of the Atchison, Topeka and Santa Fe Railway stock? A&Yes.

Q. You did. Did you know that the stock had depreciated in price from an average of \$80 a share that had been paid for this stock until it was around \$20 when you advised that?

A. I knew there had been a depreciation, Mr. Shapiro, I am not certain as to the authenticity of the exact prices you mentioned.

Q. The prospectus of the company shows that 1416 shares cost \$115,000 in round figures, which I take it is about \$80 \$\mathre{\epsilon}\$ a share average, and that 1677 shares cost \$122,000, or \$7200 for 360 shares, which would be approximately \$20 a share.

A. Yes.

Q. You knew that?

A. Yes.

Q. At the time you advised this you knew that they were not paying dividends, that stock?

A. Mr. Shapiro-

Q. Can't you answer that yes or no?

A. No, I cannot. I object. I cannot answer that question. If you ask me if I knew at that particular time that Pennsylvania Railroad was not paying a dividend; I would have to say yes—

Q. No, Atchison, Topeka and Santa Fe.

A. Wait. This is an investment company. I will say Pennsylvania Railroad paid a dividend in 1938.

Mr. Shapiro: I ask that the answer be stricken out as not responsive.

The Court: Strike it out.

By Mr. Shapiro:

Q. You were asked whether you knew at the time the additional shares of Atchison, Topeka and Santa Fe Rail-

[fol. 300] way Company were purchased that they had not paid a dividend for the year of 1938 on that stock.

A. I knew that they had not yet paid a dividend during

the calendar year of 1938.

Q. Did you know at that time that the bonds you referred to previously were in default, the interest on the bonds?

A. Yes. Your Honor, if you don't mind, the failure to

pay a dividend on the common stock is different.

The Court: That was covered this morning. The Witness: It is different from a default.

By Mr. Shapiro:

Q. No question about that. In order to save the time of going over each and every one of these stocks, you did know, did you not, that there were a number of the stocks in this portfolio that had depreciated in values—instead of saying "number," say several of them had depreciated in values and were not paying dividends at the time the additional stocks were purchased in the same company.

A. Will you repeat that, Mr. Stenographer?

(The question was repeated by the reporter.)

The Witness: Yes. Your Honor, may I also add to that "yes," that 41 out of the 42 stocks paid dividends in 1938.

By Mr. Shapiro:

Q. 41 out of the 42?

A. Yes.

Q. Which was the one that did not?

A. Atchison.

Q. Was that the only one?

A. Yes. I think in fairness to my client, the defendant in this suit, I believe that I should bring out that I employed—Porteous and Company—Mr. John Leeds Kerr, a railroad economist who has been retained by Mr. Eugene Meyer, and who has been retained by American Locomotive, [fol. 301] and who was at one time head of the railroad repartment of Standard Statistics. Mr. John Leeds Kerr was employed by Porteous and Company, Incorporated, to make an independent survey of the Atchison, Topeka and Santa Fe Railway. Mr. Kerr interviewed executives, inspected workshops and round houses, talked with shippers, talked with competing lines, surveyed crop and weather con-

ditions, and industry conditions in the territory served. Your Honor, in fairness to my client I think this should be brought out.

The Court: Don't you see, this is a matter of argument. Mr. Irwin: You go ahead, tell your reasons, that is all.

The Witness: This independent expert that we retained strongly recommended the retention and further purchase at the then current prices of that common stock.

By Mr. Shapiro:

Q. Did all the life insurance company stocks pay dividends in 1938?

A. Only one life insurance company there, Mr. Shapiro-

Q. I don't mean life insurance companies, the Aetna Company.

A. Fire and casualty and automobile.

Q. Did all the insurance companies pay dividends in 1938?

A. Yes.

Q. Did the Aetna Life Insurance Company pay a dividend in 1938?

A. Yes.

Q. Did the Fidelity Phoenix Fire Insurance Company pay a dividend in 1938?

A. Yes.

Q. Did the Insurance Company of North America pay a dividend in 1938?

[fol. 302] A. Yes.

Q. And Home Insurance Company paid a dividend in 1938?

A. Yes, sir.

Q. Did any of those companies pass any dividends in 1938?

A. Pass any dividends in 1938?

Q. Yes. When you said all of them paid dividends in 1938, it may be that some of them paid them in the early part, and then in the last or middle didn't pay any; did any of those companies pass dividends in 1938 or announce that they were not going to pay a dividend which should have been declared in 1938, payable maybe in 1939.

A. Now, Mr. Shapiro, the present tax laws on corpora-

tions have changed in great measure

Q. Can you answer my question?

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A. I cannot; no, sir; not without qualification.

Q. That is the end of it; if you can't answer, then you can't answer.

A. May I proceed, Judge?

The Court: Go ahead.

The Witness: Due to tax laws, corporations at present are not paying quarterly dividends with the same regularity and confidence as in earlier years. There is more of a tendency to wait—

The Court: That is not a responsive answer.

Mr. Shapiro: I ask that it be stricken from the record as not responsive.

The Court: It will be stricken from the record.

The Witness: If I may speak off the record——

By the Court:

Q. It is not a responsive answer. You said that all of these forty-two stocks but Atchison, Topeka and Santa Fe were on a dividend basis on December 31, 1938; you know what that means, don't you?

[fol. 303] A. On December 31, 1938, but as to passing quarterly and semi-annuals, I would rather say the custom is changed to make it an annual basis.

The Court: I know. That is why I put the question as I did.

By Mr. Shapiro:

Q. Is the American Gas and Electric Company on the big board?

A. It is on the New York Curb Exchange.

By the Court:

Q. You say you had made an analysis of all of the fortytwo stocks in the portfolio sometime prior to February 6th when you wrote this letter, 1939; you were making a continuous check, weren't you?

A. Yes, but just as a balance sheet is a photographic picture of a corporation at a certain date, our current appraisal as of, let us say, any February, was drawn on all the forty-two corporations.

Q. It was sort of a check or inventory, wasn't it?

A. Yes.

- Q. In considering the various securities, of course, you had in mind the market price of the securities, didn't you?
- A. Yes, we had in mind the market price, the then prevailing values.
- Q. Did you have before you any information or data as to the prices at which these securities had been put in the existing portfolios?
 - A. Yes.
- Q. And you had, then, the prices at which the stocks and securities had been put into the portfolios, and you had the then existing prices, the then prevailing prices?
 - A. Yes, sir.
- Q. We will say within a period of thirty days, or since the beginning of the year?
 - A. Yes.
- Q. At the beginning of 1939, what was the relationship of the two, cost and market, of these portfolios? [fol. 304] A. I don't recall the ratio of the two. I don't want to extend the time too much, but the major weight and the balance was given not to the original cost price but to the outlook for earning power—
- Q. I understand that. When you come to making recommendations you weigh numerous factors, you needn't recite them again. You said the prices were available to you, and you had in your possession the prices at which these securities had been put in the portfolio. You also had the prevailing market prices of the securities in the portfolio; what was the relationship between the two?
 - A. I don't recall.
- Q. In other words, were the prevailing prices higher or lower?
 - A. Prices were lower.
 - Q. How much?
 - A. I don't recall.
 - Q. Didn't you make a general analysis of it?
- A. Yes. Those are office notations and all of the pencil notations of the statisticians, and I don't recall them. They are probably in our files in New York City.
 - Q. You had the work sheets, didn't you?
 - A. Yes:
- Q. In other words, you had a picture of the whole situation?

A. Yes, but I don't recall and I can't give it to you now, but it is available.

Q. All right, I would like to see your work sheets on it.

A. It will take some days; they are in New York.

Q. All right. Will you produce them? You may give a summary picture, if you will.

A. All right, sir.

The Court: As to the cost and the market price. That is all.

Mr. Shapiro: As of that date, you mean, your Honor? [fol. 305] The Court: As of, we will fix it, anywhere from January 1st, 1939, up until February 6th, 1939, when this letter was written.

Mr. Shapiro: February 20th.

The Court: To February 20th, the date of the meeting. I don't know whether you have brought those figures up to date during that time, but it may be that you have.

(A letter dated February 17th, 1939, consisting of thirteen pages, to Mr. A. H. Geary, Independence Shares Corporation, from Auchincloss, Parker & Redpath, was marked Exhibit D-2.)

(A letter, February 16th, 1939, consisting of two pages, to Mr. Alfred H. Geary, president, Independence Shares Corporation, from Argus Research Corporation, was marked Exhibit D-3.)

Mr. Irwin: If your Honor please, Mr. Shapiro has read extracts from these two other letters, and I now offer them in evidence. Mr. McCown, will you take the stand?

Mr. Shapiro: I object to the offer.

The Court: You read excerpts from the letters.

Mr. Shapiro: Is he offering the entire letter in evidence?

. Mr. Irwin: Yes.

The Court: I will overrule your objection and grant you an exception.

F. C. McCown [fol. 306]

Cross-examination.

By Mr. Shapiro:

Q. Who paid the premiums on the group life insurance? A. On the company's group life insurance?

Q. For the employees of the company.

A. The company paid a part of it, and the employees paid a part.

Q. Where is the account showing what the company paid?

A. In the office.

Q. Do you keep a record of it?

A. Yes, sir.

Q. Who distributed the policies?

A. Treasurer's office.

Q. The treasurer of your company?

A. The treasurer of our company.

Q. I suppose they were for employees, only, were they?
A. That's right.

Q. How much of the premium did the company pay?

A. I think the company paid one-third and the salesmen and employees paid two-thirds, it may be the other way around, I am not positive of that.

Q. I suppose your record would show how long you con-

tinued to pay for Mr. Balanos, wouldn't it?

A. I don't think in the case of Mr. Balanos that the company paid any part of that. I think it was all paid by Mrs. Balanos, because Mr. Balanos was not an employee of the Capital Savings Plan, Incorporated. He was an employee of Mrs. Balanos, who was our general agent, and the Connecticut General Life Insurance Company, which was the insurance company in the case, made an exception in the case of Mr. Balanos and included him in our group policy.

Q. What did Mr. Balanos do? What was his wo k?

A. He was a bookkeeper, as I understood it, for Mrs. Balanos.

[fol. 307] Q. Didn't you get any complaints about him at all?

A. From whom? .

Q. From some customers or investors. You must have gotten a lot of complaints about him, didn't you?

A. I don't recall it.

Q. But didn't heysell any policies?

A. No, sir.

Q. Are you sure of that?

A. Positive of it, sir.

Q. Why do you say he didn't sell them? Do you mean he had nothing to do with the sale of them, or do you make a distinction about it?

Mr. Irwin: I object to that question as being an improper-The witness has testified, and Mr. Shapiro's question is unfair, I submit.

The Court: I will overrule your objection and grant you an exception.

The Witness: May I have the question read, sir?

Mr. Shapiro: Certainly.

The Court: Mr. Irwin, it is apparent when he said that Mr. Balanos was employed by Mrs. Balanos that he did some work. He has identified her not only as Mr. Balanos' wife, but as a general agent of the company. The question is entirely proper as to whether in the discharge of any of his duties he did selling, also, in addition to the bookkeeping he mentioned. Go ahead.

(The question was repeated by the reporter as follows:

- "Q. Why do you say he didn't sell them? Do you mean he had nothing to do with the sale of them, or do you make a distinction about it?")
 - A. Mr. Balanos was not licensed to sell contracts.

By Mr. Shapiro:

Q. So he said, but-

A. And we never had anyone sell contracts who wasn't licensed.

[fol. 308] Q. This little girl didn't sell contracts, either?

A. She did not.

Q. Have you got her account here with the company?

A. She never had an account with the company except as a contract holder.

Q. As what?

A. She held a contract; she held a Capital Savings Plan contract.

Q. Do you have her account here?

A. I don't think so, Mr. Shapiro.

Q. Can it be produced?

A. It can be produced. She didn't have any ledger account on the corporate books of Capital Savings Plan.

By the Court:

- Q. Did she sell through Mrs. Balanos?
- A. She never sold any contracts.

By Mr. Shapiro:

- Q. Who sold her mother the contract?
- A. Mrs. Balanos; her father, not her mother.
- Q. Mrs. Balanos sold it?
- A. Yes.

Q. Have you got her father's contract here?

A. I believe it is here. The error of not bringing Miss Burdette's card is my fault, I had forgotten it.

Q. What did you say your position was?

- A. I am vice-president and director of the Independence Shares Corporation.
- Q. You would then be familiar with what this card means that has been just produced?
 - A. To some extent.
 - Q. You tell the Judge what that means, for the record.
- A. This means on these dates a payment of \$10 was made to the Pennsylvania Company.
 - Q. By whom?
- A. By John A. Burdette, the owner of Capital Savings Plan A-10621.
 - Q. How many times?

[fol. 309] · A. Three times, three payments he made.

- Q. Where is there anything on that card that shows he paid \$10?
 - A. This, Mr. Shapiro
- Q. Let me revise that question. Is there anything on that card that shows on three different dates he paid \$10?
 - A. No, sir.
- Q. What is there from the card, itself—what is there that makes you know that he paid three times \$10?
- A. This is the corporation's records and not the Trustee's records, and from the payments that were made into this contract by the owners, this was the amount that was received, was deducted for insurance—
 - Q. Sit down.
 - A. I thought you wanted me to explain it to the Court.
 - Q. You can tell us without showing it to us.
- A. The first figure shows the amount that was deducted from the \$10 for insurance, and the second payment on

July 18th, 1936, shows the amount that was invested, and also the amount that was deducted for insurance, and then you have the third payment on August 29th, 1936.

Q. Suppose you start with the first payment and tell

me from that record when was it paid?

A. June 17th, 1936.

Q. From the amount deducted, which is how much?

A. There was \$1.20 deducted for insurance. There was no money available for investment on the first payment.

Q. You just answer my question; I am going to get to that. From the amount deducted for insurance you know it was a \$10 payment?

A. That's correct.

Q. Why? Sixty cents would be a \$5 payment?

A. Yes.

Q. And \$1.20 is a \$10 payment?

A. That is the first deduction for insurance costs.

Q. What else does it show was deducted?

A. It doesn't show any other deductions.

[fol. 310] Q. How do you know there was no amount available for investment?

A. That was the procedure in connection with the plan, Mr. Shapiro.

Q. Is there anything on that card that tells you that?

A. No. This is simply our record, not the Trustee's record.

Q. I understand that. If I was the person whose card you are holding, and I wanted to know how much of my money was invested from that card, how much would you tell me was invested?

A. From this card?

Q. Yes.

A. I could tell you nothing.

Q. You don't mean you could tell me nothing?

Mr. Irwin: I ask Mr. Shapiro to give him a chance to say what he meant.

The Court: That is all right.

Mr. Shapiro: He understood what I meant.

The Witness: I meant there is nothing to show here.

By Mr. Shapiro:

Q. The card shows there was nothing invested?

A. That is correct.

Q. Why is it? Ten dollars was paid.

A. The set-up of the plan provided that from the first nine payments under a Capital Savings Plan contract, our fee of \$60 was deducted, and also the Pennsylvania Company's fee of 25 cents. That was deducted, if my memory is correct, on the basis of \$8.55 of the first \$10 came to our company, and 25 cents came to the Pennsylvania Company, and if there wasn't any insurance attached to the contract that was invested; if there was insurance, then the cost of the insurance was deducted. In the case of an insurance contract, it left, I think, no money available for investment; [fol. 311] it may be two or three cents, but not enough to make an investment.

- Q. For how long would that be? For the first three months?
- A. No. In the case of an insurance contract that apparently was only in the first month. I see by this contract there was 23 cents invested in the second month and 24 cents—I mean from the second payment, and 24 cents from the third payment. Of course, the cost of the insurance is a reducing cost as the amount is covered.

By the Court:

Q. How long did that go on? For how many months before the deduction of \$60 was made?

A. Nine months, the first nine months. The heaviest portion of the cost came out in the first three months. \$8.55 was deducted from the first payment.

Q. Out of the \$90 paid in during nine months, assuming there was no insurance—

A. There was only \$60 deducted in our company, and 25 cents for the Trustee.

Q. I say on the \$10 a month plan there would be \$90 paid in during nine months, and \$60 would go to Capital Savings, and \$2.25 would go to the Trustee, and then there would be a balance which would be invested.

Mr. Shapiro: \$1.20 would go to the insurance. The Court: I said in a case of no insurance.

By the Court:

Q. On a \$10 a month plan there would be \$90 paid in during nine months, 25 cents a month would be deducted

for the Trustee, and if the cost of the insurance was added, how much would that be?

A. The cost of insurance, you mean?

Q. Yes.

A. The cost of the insurance was reduced. When we first started to sell the insurance, it was a dollar per thousand per month on the unpaid balance; then it was reduced [fol. 312] by the insurance company to eighty-two cents, and then it was reduced to seventy-two cents. I don't know just when the reduction took place, but the cost of the insurance would be based on the prevailing cost of the insurance at the time the deduction was made covering the unpaid balance of the contract. So, we will assume that \$1.20 was deducted at this particular time; that would be insurance covering \$1190 at a dollar per thousand per month. That would be \$1.20, wouldn't it, or \$1.19.

By Mr. Shapiro:

Q. Did it decrease with each payment because they insured ten dollars less?

A. Yes.

Q. So, your insurance was only an insurance against the payments?

A. Insuring the unpaid balance of the contract.

Q. The insurance was never more than \$1200, was it? A. Correct, sir; never more than \$1190.

Q. Never more than \$1190?

A. That's right.

Q. That is all you insured?

A. That's right.

By the Court:

Q. Would it be fair to say the average payment in those nine months on the insurance premiums would be about a dollar a month, or \$9?

A. I think that would be a fair estimate, yes.

Q. That would leave about \$18.75 in cash to be actually invested over that nine months' period after deducting your \$60 service fee and \$2.25 for the Pennsylvania Company charges?

A. It would be about twelve, sixty plus six, sixty-six.

Q. You said a dollar a month, which would be \$9.

A. Yes.

Q. \$69, and nine times twenty-five would be \$2.25.

A. Yes.

Q. Which would leave \$18.75.

A. Yes.

[fol. 313] By Mr. Shapiro:

Q. When the money was paid to the Pennsylvania Company, it came to you from the Pennsylvania Company afterwards? How did it get to the Capital or the Independence Company?

A. You mean our commission?

Q. These charges that you made here outside of the insurance.

A. The only part of the ten dollars that we got, Mr. Shapiro, was our service charge.

Q. What happened to the insurance money?

A. The Pennsylvania Company paid that to the insurance company for the coverage.

Q. The 25 cents the Pennsylvania Company kept for itself?

A. That's correct.

Q. And then they sent you a check for your charge of what? What was it?

A. \$8.55, I think it was, wasn't it, on the first \$10?

Q. \$8.55, yes; \$8.55 for the first month, \$8.55 for the second month, \$8.55 for the third month, \$6.55 the fourth month, and \$6.55 the fifth month?

A. That is the schedule in that respect.

Q. What was that charge for?

A. I beg your pardon?

Q. How did you arrive at \$8.55? Oh, that is the \$60?

A. That is the way the \$60 was deducted.

Q/What happened to this man's insurance?

A. What happened to it?

Q. Yes.

A. I believe it lapsed in his case because he didn't make his payment within a period of ninety days.

Q. Did you have insurance for him?

A. Yes.

Q. Can you produce the contract? Is it here?

A. The insurance policy?

Q. Yes.

[fol. 314] A. There is only one policy, that is the master policy in the possession of the Pennsylvania Company.

The individual got a contract certificate in a yellow form, gold form or orange form, which contained the insurance clause, the statement he was covered under the company's—the Connecticut General's group policy which covered all the people who exercised the option of the Capital Savings Plan contracts, the insurance option.

Q. Do you know when he died?

A. I do not.

Q. Is there anything in your records to show when ke died?

A. I would think so. I think there was some correspondence about that between the treasurer's office and the Burdettes.

Q. When did you issue such a certificate? Do you have

a copy of it?

A. We don't have a copy of the certificate, no sir. The application that Mr. Burdette signed which would have covered the insurance feature, the original application is in the possession of the Pennsylvania Company.

Q. Was there a custom that moneys could be paid to

agents, these \$10 payments could be made to agents?

A. As a matter of convenience to contract holders, if they desired to do that, it was done.

Q. Then the company settled up with the agents periodically?

A. Oh, no. The payments received by the agent from a contract holder were turned into the Pennsylvania Company either direct by the agent or through our office.

Q. Was there a custom that the Pennsylvania Company would accept these payments in a lump from the agent when they collected, and the agent would get it from a half a dozen or more people, and then make a payment to the Pennsylvania Company periodically?

A. With the pass books of the individuals, and the Pennsylvania Company would enter, and make the entry of those payments in the pass books of the contract holders.

[fol. 315] Q. At the time the Pennsylvania Company received the money?

A. Yes.

Q. Was there a question in this case about the fact that this man had paid his money to an agent who had not yet turned it over to the Pennsylvania Company?

A. I wouldn't say that, Mr. Shapiro. There was some correspondence in regard to Mr. Burdette's insurance, but

I am not familiar with it.

Q. Who has the correspondence about it?

A. I don't think it is here. I think it would be in the files of the company at 1518 Walnut Street, if we have it, or in the possession of the Pennsylvania Company.

Q. What does this stamp on the bottom mean?

A. I can't answer that, Mr. Shapiro.

Q. You can't answer that?

A. No.

Q. Don't your records show that this man died on November 30th, 1936, and that as late as May, 1937, you were still asking payments from this man?

A. Do our records show that?

Q. Yes.

A. I don't know, Mr. Shapiro.

Q. That record isn't here?

Mr. Bohlen: What isn't here?

Mr. Shapiro: I am not asking you. Does the company have the file of Mr. Burdette here?

Mr. Irwin: We were not asked to have it here.

Mr. Shapiro: No, I am not criticizing you.

Mr. Irwin: I will find out.

By Mr. Shapiro:

Q. Here is an envelope; don't pay any attention to these notations on it. Here is an envelope from your company dated May 14th, 1937, addressed to Mr. Burdette. That comes from the Capital Savings Company, doesn't it? [fol. 316] A. That certainly is our envelope.

Mr. Shapiro: I would like now to call at a convenient time on the company to produce a copy of the letter that was

contained in the May 14th, 1937 envelope.

Mr. Irwin: If your Honor please, we have nothing to conceal, but to ask us to give him a letter that was in that envelope—it may have been just a formal notice we sent out to all the plan holders.

The Court: If it was a formal notice, you say it was a

formal notice. If you don't have it, you say so.

Mr. Irwin: I think it is an unreasonable demand.

The Court: There is nothing unreasonable about it. You consult your files; if it isn't there, it isn't there. Isn't this a case where the young lady testified the insurance instead of being paid to her mother or to the estate was paid over to the Pennsylvania Company?

Mr. Shapiro: No; in addition to that, she testified her family was to get the insurance and never got the insurance. The money was never paid over to the Pennsylvania Company; the payments that were made were never paid over to the Pennsylvania Company.

By Mr. Shapiro:

- Q. You have not been able to answer?
- A. I can't answer, Mr. Shapiro.
- Q. Who could?

Mr. Irwin: If your Honor please, he doesn't know who can answer the questions.

By Mr. Shapiro:

Q. Can you give me-

The Court: Mr. Irwin, can't he say so? Mr. McCown can answer these questions. I must say again that the witnesses [fol. 217] who are being called here are all, it seems to me, highly intelligent. They know what they know, and they know what they don't know, in a sense. Let them answer it. If any witness feels he is being asked an unfair question, he can address himself to the Court. I don't think that we need any intervention by counsel on either side to assist witnesses; or to come to their rescue. Don't you have any hesitancy; if you don't know, tell us that you don't know.

By Mr. Shapiro:

- Q. Who would be able to answer?
 - A. Someone in the treasurer's office.
- Q. That is what I want to know. Are you able to tell me how long after a failure to pay a premium that the insurance lapses?
 - . A. Ninety days.

Q. Ninety days from what?

A. Just a moment, Mr. Shapiro, I may not be correct on that, whether it is ninety days—for instance, if a person makes a payment for the second payment and then fails to make a payment within a period of ninety days, then I think their insurance lapses.

Q. Where would I find that out in writing? Is there some kind of a contract that shows that? From where did you get.

that information?

A. The policy, the Connecticut General Life Insurance Company's policy covering the people insured. The Capital Savings Plan contracts allows for a grace period of thirty days, and it has always been the policy of the company to extend an additional grace period of sixty days, during which time the company could pay the insurance plan as an additional service to the contract holder.

Q. How do you figure the thirty days or the sixty days?

A. I don't know, that was figured before-

Q. I don't mean how you arrive at it, I mean from what point does the thirty days begin? Apparently payments [fol. 318] were made in June on the first, sometimes on the seventeenth, sometimes on the fifteenth; when did the thirty days begin?

A. The date the contract was issued, the date that the payments are due. For instance, if the contract was issued on the seventeenth of the month the next payment on that contract would be due on the seventeenth of the following

month.

Q. Isn't it true that what you did in order to take care of that was that the company, itself, paid the two months' premiums, advanced the two months' premiums by authorizing the payment of it to the insurance company, or don't you know that?

A. I don't know exactly what the operation was.

Q. Who would know that?

A. Someone in the treasurer's office.

Mr. Shapiro: I ask that this card be marked for identification; it was produced by defendant, and I suppose you want it marked with your number.

Mr. Irwin: Are you going to offer it?

Mr. Shapiro: I may. It doesn't make any difference to me.

Mr. Irwin: You better keep it within your list of exhibits. Mr. Shapiro: Mark it with my next number.

(The eard of John A. Burdette on the contract No. A-10621 was marked Plaintiffs' Exhibit No. 78 for Identification.)

Mr. Shapiro: Mark this envelope that has been identified.

(An envelope addressed to Mr. John A. Burdette was marked Plaintiffs' Exhibit No. 79 for Identification.)

[fol. 319] Mr. Shapiro: Mr. Porteous, recalled, was asked whether it is not true United States Steel Corporation didn't pay a dividend in 1938, and he says that is correct.

J. T. BALANOS.

Cross-examination.

By Mr. Shapiro:

- Q. You are not now employed by Capital Savings or Independence Trust Shares, are you?
 - A. I am employed, yes.
 - Q. You are employed by them?
 - A. Yes, sir.
 - Q. As what?
 - A. As a general agent or distributor.
 - Q. Does that authorize you to employ other people?
 - A. Yes, sir.
 - Q. Your contract?
 - A. Yes, sir.
- Q. Give me the names of the persons you employed under that authority.
 - A. Under the Capital Savings or Independence Shares?
 - Q. Either one, please.
 - A. All the people under my employment?
 - Q. Give me the names of them, I say.
 - A. The active ones or the inactive ones?
- Q4 All of them that you employed from the time you went in the employ of the company; give me the names of them.
- A. There is, first, Miss Angelo, Miss Endoslow, Miss Kirkpatrick, Mr. Camp, Mr. Miller, Mrs. Irete, Mrs. Wilkins, Mrs. Merrill; thirteen, all told.
 - Q. How many were with you from the beginning?
 - A. From the beginning?
 - Q. Yes.
- [fol. 320] A. I didn't employ all of them directly; they worked under me. Some of them were handed over to me from the home office.
 - Q. When did you become a general agent?
 - A. In 1936. You have the contract.
 - Q. Just answer the question.

A. All right.

Q. What part of 1936?

A. I don't know just exactly; I think in the fall of 1936.

Q. Were you employed before that?

A. I was a sales person since 1933.

Q. All right. Under whom were you-

A. I worked under the home office, Philadelphia.

Q. The home office in Philadelphia?

A. That's right.

Q. What was your husband doing in 1933 up until now?

A. He wasn't doing anything.

Q. He had no employment at all?

A. No regular employment.

Q. No regular employment; what irregular work was he doing?

A. He tried insurance for a while.

Q. What else?

A. I can't remember that he did anything else.

Q. He didn't, by any chance, work under you, under your general agency?

A. Positively not.

Q. Never had anything to do with it?

A. No, sir.

Q. Nothing whatever?.

A. Other than my bookkeeper.

Q. Oh, he was your bookkeeper?

A. When I became a general agent he stayed home and kept the books, that is true.

Q. He stayed home?

A. I have a sub-agent in my own home, ves.

[fol. 321] Q. What do you mean, you have a sub-agent?

A. I have an office in my apartment.

Q. Who is in the office that you have there?

A: I am the agent there.

Q. You said something about, "I have a sub-agent in my own home;" I want to know what you meant.

A. That is a branch. I am simply an agency working under the Philadelphia office, that is all.

Q. And you had an agency in your home?

A. That's right.

Q. Your office was with the company?

A. My office was in my home.

Q. And your husband kept your books? .

A. He kept the books.

Q. What kind of books did you keep? What did he have to do? What books did he keep for you?

A. Simply the payments that came in from time to time,

the delinquents, the ones that were up to date.

Q. Agents' commission, by any chance?

A. Agents' commission?

Q. The money you paid out to the agents, did you have any record of that?

A. I don't pay anything out to the agents.

Q. When you employed sub-agents, didn't you pay them?

A. No, sir.

Q. All the money you made as commission's belonged to you?

A. That's right.

Q. What were those commissions based on?

A. On production.

Q. I mean what is the basis of it? How much did you get, and on what basis?

A. I got \$40 on each \$10 unit purchased.

Q. No matter who sold it?

A. I sold them all.

Q. What about these agents?

[fol. 322] A. Oh, my agents; I had an overwriting on them.

Q. Did you get any commission on what they did?

A. An overwriting.

Q. What was it?

A. \$10 on each \$10 unit.

The Court: What did they get?

By Mr. Shapiro:

Q. What did they get?

A. To begin with, they got \$25 a unit until they sold fifty units, then they got \$30. I got \$15 when they got \$25, and I got \$10 when they got \$30.

Q. You had thirteen people?

A. That's right,

Q. Those thirteen people got how much for each contract they sold?

A. They got \$25 until they had sold fifty units, and then they were increased to \$30. In other words, I got \$15—

Q. Just tell me what they got. First, while they were getting \$25 and they were working through your agency, how much did you get in addition to the \$25 they got?

A. I got \$15.

Q. \$15?

A. Yes.

Q. When did you get your \$15, and when did they get their \$25? At what stage of the proceedings did they get it?

A. Well, I didn't get anything until after they had gotten

theirs out.

Q. When did they get theirs?

A. They got \$5 for each \$10 payment from the first five payments.

Q. In other words, as a result of a \$10 contract and a \$10 payment they got \$5?

A. That's right.

Q. Did you get a portion of that monthly?

[fol. 323] A. No, not until they had gone beyond theirs.

Q. After they had gone beyond theirs, you came in for \$15, first?

A. No, this was taken out of the first nine months, so it took me between the fifth and ninth month to get mine.

Q. When you sold contracts you got \$40?

A. That's right.

Q. How did you get that money?

A. I got \$5 on each \$10 that was brought in.

Q. If it was a \$5 contract, you got \$20?

A. I got \$2.50.

Q. Every time?

A. That's right.

Q. But the total was \$20?

A. That's right.

Q. Did you keep a record of the moneys you earned as commissions?

A. He kept a record for me.

Q. He kept a record for you?

A. As best he did.

Q. Where?

A. In my home.

Q. You don't have it? Is it still existing?

A. If you could make his records out, you would be doing good.

Q. Does the record exist?

A. Yes.

Q. What books did you keep?

A. He kept the books.

Q. What books did he keep?

A. Just a bit of this, that and everything.

Q. You never could read it?

A. No, and nobody else could.

Q. When did you find out you couldn't read it?

A. When I took over the books myself.

Q. In the meantime he kept the books for you?

A. He kept the books for me, yes.

Q. What was the purpose in his keeping the books? [fol. 324] A. What was the purpose?

Q. Yes.

A. I was on the road; he had nothing else to do.

Q. What was the purpose of keeping the record?

A. To know what I was earning from time to time, and what my several people had, and what my expectancy might be.

Q. How long did he keep it?

A. From the time I took over the general agency until. I left him.

Q. How much were your earnings the first year he kept the records?

A. I don't know what the first year was; probably \$3000.

Q. Will the records show that?

A. Yes.

Q. How much did you earn the second year? Do you know what it was, approximately?

A. It increased about a thousand dollars every year from the beginning of my association until the present time,

Q. So that the first year was 1933?

A. That's right.

Q. And you say the records will show \$3000, approximately?

Mr. Irwin: Pardon me, Mr. Shapiro, 1936 was the general agency.

Mr. Shapiro: Now, Mr. Irwin, I think she understands me.

By Mr. Shapiro:

Q. The first year was 1933 that you were employed by this company?

A. That's right.

Q. And you say \$3000 represents your earnings for that first year?

A. I don't know exactly what the earnings were. I have my income tax things, I don't know exactly what it was.

[fol. 325] Q. Did you make up your income tax records from those records—

A. Yes.

Q. -which your husband kept?

A. Yes.

Q. How many books were there that he kept?

A. There were no books, they were just sheets of paper he kept.

Q. He only kept it on sheets of paper?

A. Yes.

Q. Do you still have those sheets of paper?

A. I have most of them that I could salvage.

Q. Of course, when you were making the sale, he didn't go with you on any of these occasions?

A. He might have driven along with me on some occasions.

Q. But he didn't sell any?

A: Positively not.

Q. He wasn't in the presence of these people when any of these contracts were sold, was he?

A. Some of these were sold in sociable gatherings; I mean, they were discussed in sociable gatherings. These people he mentioned were all social friends of mine.

Q. What I mean is he never assisted or helped you in the

sale of any of these?

A. Positively not. He was interested in the business as well as I.

Q. How was he interested in it?

A. How was he interested in it?

Q. Yes.

A. He was naturally interested in the income of what we made.

Q. No, I don't mean that. What did you mean when you said he was interested in the business as well as you?

A. Naturally, a man and a wife working together—I mean a wife having a business and having a husband, isn't he naturally interested in what she might produce? [fol. 326] Q. Why did you change that "working together" that you started to say? Why did you drop that?

A. I didn't mean "working together."

Q. You didn't mean it?

A. No.

Q. What did you mean, when you said he was interested in the business?

A. He was interested in what I would get out of the busi-

ness.

Q. Was he interested in it financially?

A. Naturally, when he had no regular income of his own.

Q. How much was his interest in that business?

A. I don't know what you mean how much was

A. I don't know what you mean, how much was his interest in that business.

Q. You don't know what I mean?

A. He was naturally interested if I earned \$5000 much more than—

Q. That is not what you said. You said he was interested in that business. I want to know to what extent he was interested in that business.

Mr. Irwin: If your Honor please, I object.
The Court: Objection overruled, exception.
Mr. Shapiro: Will you read my question?

(The question was repeated by the reporter as follows:

"Q. That is not what you said. You said he was interested in that business. I want to know to what extent he was interested in that business.")

By Mr. Shapiro:

Q. How much was his interest?

A. He was naturally interested to see that I produced.

- Q. I am not concerned with that; I am not inquiring about his natural interest. I am inquiring about his financial interest. How much was the financial interest that he had? [fol. 327] A. It is very much nicer to live on \$5000 than on \$1000.
 - Q. How much did you give him? A. I didn't give him anything.

Q. How much of the money that you earned did you pay over to him?

A. I didn't pay anything over to him. Q. What was his financial interest, then?

A. Simply his livelihood.

Q. His livelihood?

A. Yes.

Q. When did you give that to him?

A. Provided for him.

- Q. How? Cash? Did you give him the cash?
- A. No.
- Q. How did you provide for him? Check? Did you have a check book?
 - A. No.
 - Q. You didn't keep any checking account?
 - A. No.
 - Q. How were you paid by the company, cash or check?
 - A. By check.
 - Q. What did you do with that check?
 - A. Cashed the check.
 - Q. It was made out to you?
 - A. That's right.
 - Q. Did you give him any of the cash?
 - A. No.
 - Q. You never gave him any of the cash?
 - A. No, not for his personal use.
 - Q. I didn't ask that. I said did you give him any cash?
- A. I gave him enough money to pay the telephone bills on occasion.
 - Q. Is that all you ever gave him?
 - A. I never gave him any for his personal use, no.
- Q. Then he had no interest financially in your business, did he?
- A. If I clothed him and fed him, he must have had some interest.
- [fol. 328] Q. Did you hear him on the witness stand?
 - A. Yes, I did.
 - Q. Did you hear him talking about this plan?
 - A. Yes, I did.
- Q. Where did he get that information? From you? He seemed to know something about the plans; where did he get that information?
 - A. He had a kit, didn't he?
 - Q. A what?
 - A. A sales kit.
 - Q. Where did he get that?
 - A. He took it from my car,
 - Q. From your car.
 - A. Yes.
 - Q. How long did he keep it?
 - A. He still has it, unless you have it.
 - Q. When did he take it?
 - A. A month after I left him.

Q. When was that?

A. In January.

Q. What year?

A. 1937.

Q. Has he had at since?

A. He has had it since, yes.

Q. Did you get yourself another one?

A. Yes.

Q. Before that did you discuss the plans of this company with him?

A. Well, if I had an agency in there and I had all my literature there, he certainly knew something about the business.

Q. That isn't what I asked you.

A. I don't know what you asked me.

Q. Why don't you pay attention to the question? It will save my voice. Will you read the question?

(The question was repeated by the reporter as follows: .

[fol. 329] "Q. Before that did you discuss the plans of this company with him?")

A. Certainly, I did.

Q. Where did you see Mr. Charles Bashore when you sold him the contract?

A. At his home?

Q. Where is that?

A. Church Farm School, Glenloch.

Q. Was Mr. Balanos with you?

A. Yes, he was with me.

Q. How long did you stay there?

A. I went in there and talked with Mr. Bashore long before Mr. Balanos came in.

Q. I didn't ask you that. I asked how long you tayed there.

A. I stayed the entire evening.

Q. How long did your husband stay there?

A. He was there half the time I was there.

Q. Did you sell Mr. Yarnall?

A. No, not Mr. Yarnall.

Q. Mrs. Yarnall?

A. Not Mrs. Yarnall.

Q. What was the name?

A. Miss Gertrude Yarnall.

Q. Miss Gertrude Yarnall?

A. That's right.

Q. Where does she live?

A. She lives in West Philadelphia at the present time, I believe.

Q. Was your husband with you at the time this sale took place?

A. She was in my home.

Q. Was your husband there?

A. He was usually there.

Q. Was he there at that time?

A. Yes.

Q. What was this about Ring I heard? Did you sell that?

[fol. 330] A. I did.

Q. Was your husband with you?

A. No, sir.

Q. Where was it you sold that contract?

A. A block from my home in Radnor.

Q. Casson, that is another name.

A. Casson.

Q. Did you sell Casson?

A. I did.

Q. Was your husband with you?

A. No, sir.

Q. Where did you sell Mr. Burdette?

A. At his home.

Q. Who was with you at that time?

A. I was there alone.

Q. Who else was there besides you?

A. The family.

Q. What family?

A. The Burdette family.

Q. Who were they?

A. I don't remember just which ones. Mrs. Burdette was there, and probably her younger sister.

Q. Did you sell the girl, Laura Burdette, a contract?

A. I did.

Q. Did you get all the commission?

A. I did.

Q. Did Laura get any commission?

A. None whatsoever.

Q. What happened to Laura's contract? You sold it; what happened to it?

A. She cashed it in when I left my husband.

Q. What do you mean, she cashed it in?

A. She no longer had the funds to pay for it.

Q. What happened to it? A. What happened to it?

Q. How did she cash it in?

A. She had no means to keep on paying her contract. [fol. 331] Q. What happened?

A. She withdrew.

Q. How much?

A. I don't know; she testified the other day.

Q. You were there.

A. I wasn't there at the time she withdrew.

Q. You were with the company, it was your customer; weren't you interested in what she was getting back?

A. It was something like four or five dollars,

Q. That was the first time?

A. Yes.

Q. How much did she get after that?

A. I don't know the exact figures.

Q. You were not interested?

A. Not in Laura Burdette, no.

Q. To whom were Mr. Burdette's payments made?

A. To the Pennsylvania Company.

Q. Did you get any of them?

A. I took them in, yes.

Q. How many?

A. I don't know how many. I think he had three pay ments in, had he not?

Q. I don't know, I am asking you.

A. I don't know offhand.

Q. Whatever payments were made, were made to you?

A. That's right.

Q. When did you take them in? As of the date you received them, or did you lump them?

A. I didn't lump them.

Q. When did you take them in?

A. Probably the day following the payment.

Q. The day following the payment?

A. That's right.

Q. You never kept them a couple of weeks, or anything like that?

A. No.

Q. When you got these payments, did you enter them on a paper?

[fol. 332] A. I gave him a receipt for the payments. Q. You gave him a receipt for the payments?

A. That's right.

Q. Did you make a record of it?

A. Why would I make a record of it?

Q. When you received it from the person who paid it,

did you make a record in your books?

A. I never made a record until I got my commission from the Pennsylvania Company. I wasn't concerned in the payments.

Q. You had to pay it over?

A. That's right. I gave him a receipt. Q. And you kept no record for yourself?

A. No, because I had his pass book and he had the receipt.

Q. You had the pass book?

A. Yes, I had the pass book, he had the receipt.

Q. You would put it in the pass book?

A. What?

Q. You received the money-you know, there is no sense in getting angry.

A. It is "o idiotic.

Q. I am trying to ask you some questions.

The Court: Just compose yourself and answer these questions. If there is any question that is asked of you that your counsel thinks should not be asked, he will object.

By Mr. Shapiro:

Q. When you got the money, did you keep a record anywhere of the money that you received from the person who paid you, because you were to take it to the Pennsylvania Company?

A. That's right.

Q. I want to know how you would know, what records you would keep to know whether or not you received the money, and from whom.

[fol. 333] A. I had the pass book, and the money in the pass book, which I kept until I went to the Pennsylvania

Company.

Q. That is what I asked, whether you put the money in the pass book.

A. That's right.

Q. That was your only identification, wasn't it?

A. That's right.

- Q. I gathered from what you said that you were a sales person; as between yourself and your husband, you were the chief person, you knew more about this Capital Savings and he didn't do any kind of work whether in your employment or otherwise.
 - A. I don't quite follow that. I was first—
 - Q. Were you there ahead of Mr. Balanos?

A. In the office?

Q. Yes, were you working there in the place before Mr. Balanos?

A. Yes.

Q. Or did he bring you into the picture?

A. No, sir.

Q. You brought him into the picture?

A. No, sir.

Q. What do you mean by that? What do you mean, "No, sir"? You didn't bring him into the picture at all?

Mr. Irwin: If your Honor please, I think "No, sir" is something that anybody can understand, even Mr. Shapiro.

The Court: Do you object on the ground she has answered the question?

Mr. Irwin: Yes.

The Court: I will sustain your objection.

By Mr. Shapiro:

- Q. Didn't you bring him into the picture at all? Don't you consider your husband was in this picture at all? [fol. 334] A. No, I don't consider he was in this picture at all.
- Q. That is what I want to know. So far as you were concerned, he never sold a contract, or never had anything to do with the sale of any of these contracts?

A. No, sir.

Q. You have no doubt about that?

A. No doubt whatsoever.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Mrs. Balanos-

Mr. Shapiro: Could I ask you another question?

Mr. Irwin: Surely.

By Mr. Shapiro:

Q. You might tell us how your husband was named as an employee by you. How did you happen to name him as an employee?

A. Named him as an employee?

Q. Yes.

A. Simply because when I took over the agency someone would have to be there to take care of the telephone, and things of that kind, and rather than take a stranger, I employed Mr. Balanos.

Q. You did employ him?

A. As my bookkeeper, yes.

Q. How much did you pay him?

A: His maintenance.

Q. You didn't tell me that before.

A. I am telling you now.

Q. You are telling me now-

Mr. Irwin: If your Honor please, I submit this woman has already testified she maintained the home, that she bought the food, that she bought—

The Court: I don't recall that she gave any such testimony. As a matter of fact, she said occasionally she gave him some money to pay telephone hills

him some money to pay telephone bills.

[fol. 335] Mr. Irwin: She testified she maintained the home, and she bought the food.

Mr. Shapiro: We will argue the value of this witness' testimony afterwards.

By Mr. Shapiro:

- Q. It has been testified you arranged for this policy?
- A. That is true.
- Q. For \$1000.
- A. That is true.
- Q. How much did you pay as a premium for it?

A. I paid the full amount.

Q. The full amount?

A. Yes.

Q. How much was it?

A. It was sixty cents quarterly. Q. And you paid the sixty cents?

A. Yes.

Q. And you told the company that he was an employee, didn't you, or you wouldn't have gotten the policy?

A. Well, I made a special request that they might con-

sider Mr. Balanos as my employee.

Q. As your employee?

- A. And try to put him in group insurance. He had no insurance.
 - Q. You made yourself beneficiary?

A. Absolutely.

Q. And you paid the premium, and you named him as an employee?

A. That's right.

Q. And you say just now he was your bookkeeper, you employed him as bookkeeper?

A. That's true.

Q. Will you tell us how that was? If he was your employee, why did you name him as an employee of Capital Savings?

A. He isn't an employee of Capital Savings.

Q. Why did you name him such?

[fol. 336] The Court: Isn't that a matter for argument? Mr. Shapiro: I want this witness' testimony, and I want you to see her testimony. I want her to tell your Honor. and me in answering my question why she said he was her employee when this contract says he was Capital Savings' employee.

The Court: If you can, answer it.

The Witness: As I say, I requested a special favor of our company to allow me to put him in this group insurance. He had no insurance, and I made a special request. and after some consideration they said they would make an exception to it and allow Mr. Balanos to participate.

By Mr. Shapiro:

Q. You said that. From whom did you make this request?

A. I talked to Mr. McCown about it, and I told Mr. Bonner about it.

· Q. They are both Capital Savings people, aren't they?

A. That's right.

Q. Whose employee was he?

A. He was my bookkeeper. He never appeared in any way, shape or form in the books of Capital Savings.

Q. And you never paid him any salary?

A. I never did.

Mr. Shapiro: That's all.

By Mr. Irwin:

Q. Mrs. Balanos, I have here some papers-

By Mr. Shapiro:

Q. While we are waiting for the papers, Mrs. Balanos, when one of your agents sold a contract, whose name appeared on the contract application?

A. Well, the agency was at the top, and then the agent

who sold it was underneath.

[fol. 337] Q. So that the person whose name actully sold it was the bottom name?

A. That's right.

Q. Where it said "agent" would be your name, and "representative" would be your representative?

A. That's right.

Mr. Shapiro: While you are looking through the papers, have you Mr. Balanos, application there?

Mr. Irwin: I don't know,

The Court: We will take a five-minute recess.

(Recess for five minutes at 2.50 o'clock P. M.)

After Recess

Present: Counsel as before noted.

JANE T. BALANOS, recalled.

Redirect examination.

By Mr. Irwin:

Q. Mrs. Balanos, I show you here photostatic copies of the original applications for these plans; that is, the one of Joseph M. Casson. Who does that show as having sold that plan?

A. J. T. Balanos.

Q. Who is J. T. Balanos?

A. I ant.

Q. I ask the same question regarding Gertrude Yarnall?

Mr. Shapiro: Of course, I should say these documents speak for themselves.

The Court: They speak for themselves; you are going to

offer them in evidence, I assume.

[fol. 338] Mr. Irwin: I will offer them in evidence. These are the copies of applications of the various parties that Cosme Balanos said that he sold to and that Laura Burdette said that she sold to. Will you mark those defendants' exhibits with the proper numbers? And I offer those in evidence.

The Court: Any objection?

Mr. Shapiro: No.

(Photostatic copy of application of Joseph M. Casson for contract certificate of Capital Savings Plan was marked. Exhibit D-4.)

(Photostatic copy of application of Jane M. Fairweather for contract certificate of Capital Savings Plan was marked Exhibit D-5.)

(Photostatic copy of application of Claribel Huber Ring for contract certificate of Capital Savings Plan was marked Exhibit D-6.)

(Photostatic copy of application of Berthe E. Deloye for contract certificate of Capital Savings Plan was marked Exhibit D-7.)

(Photostatic copy of application of C. Louis Deloye for contract certificate of Capital Savings Plan was marked Exhibit D-8.)

(Photostatic copy of application of Charles M. Bashore for contract certificate of Capital Savings Plan was marked Exhibit D-9.)

(Photostatic copy of application of John A. Burdette for contract certificate of Capital Savings Plan was marked Exhibit D-10.)

(Photostatic copy of application of S. Radner Kromer for contract certificate of Capital Savings Plan was marked Exhibit D-11.)

[fol. 339] (Photostatic copy of application of Arthur H. Sievers for contract certificate of Capital Savings Plan was marked Exhibit D-12.)

(Photostatic copy of application of Mina Sievers for contract certificate of Capital Savings Plan was marked Ex-

hibit D-13.)

(Photostatic copy of application of Miss Gertrude W. Yarnall for contract certificate of Capital Savings Plan was marked Exhibit D-14.)

By Mr. Shapiro:

Q. Will you pick up those eleven photostatic copies of applications that Mr. Irwin has shown you and pick out those that are in your handwriting?

A. Some of them are stamped here.

Q. How many of them are in your handwriting?

A. Six.

Q. Six out of the ten?

A. Yes.

Q. Will you let me have the six, please?

A. This is stamped (indicating).

Q. Now, you have identified Defendants' Exhibits 4, 5, 6, 7, 8 and 9, these six, as being in your handwriting; is that correct?

A. Yes.

Q. You said that numbers 10, 11, 12 and 13 are not in your handwriting; that is correct, isn't it?

A. There is a printed one; the printed one isn't here.
Q. I am asking you about those not in your handwriting,

10, 11, 12, and 13, is that correct?

A. That's right.

Q. In whose handwriting are they?

A. Probably Mr. Balanos' handwriting.

Q. Do you know? You said probably. Do you have any doubt about whether they are in Mr. Balanos' handwriting?

A. They are Mr. Balanos' handwriting.

[fol. 340] Q. They are. They concern the contract of Burdette, Kromer, Sievers, and Sievers again; that's right, isn't it?

A. Yes.

The Court: You mentioned Burdette; is that John.A., or Laura?

Mr. Shapiro: J. A. Burdette. The Witness John A. Burdette.

By Mr. Shapiro:

Q. I suppose all but the signature of the application is in the handwriting of Mr. Balanos, that which is not typed or printed?

A. Yes.

Q. The No. 14 which you said had the name Balanos stamped in it says Balanos, Salesman; in whose handwriting is the "Ten?" and the dates, the rest of the application outside of the signature on the application?

A. That is Mr. Balanos' handwriting.

Mr Shapiro: All right. Thank you, that's all.

The Court: What is the name on that?

Mr. Shapiro: Gertrude W. Yarnall.

By Mr. Shapiro:

Q. I show you two applications which are numbered 19989 and 31972, Capital Savings Plan, and ask you whether you can tell me in whose handwriting they are?

A. Cosme Balanos'.

Q. That is your husband?

A. That's right.

Q. And those are his contracts which he purchased, is that right?

A. I purchased for him.

Q. Well, according to the application he purchased them.

A. I paid for them.

[fol. 341] Q. According to the application, he purchased them? Will you answer that.

A. He applied for them.

Mr. Irwin: If your Honor please, I ask Mr. Shapiro not to stand on top of the witness.

. The Court: He can't show her the exhibits without being close to her. Will you take your place?

By the Court:

Q. He was a plan holder?
A. He was a plan holder,

By Mr. Shapiro:

Q. That is your husband?

A. That's right.

Q. What is the date of those two contracts?

A. One is March 30th, 1935, and the other is April 15th, 1936.

Q. At that time did you have a general agency?

A. In 1935, I did not; in 1936, I did.

Q. Did you?

A. I believe so, I wouldn't swear to it.

Q. Is there anything on the application that could help you answer that question?

A. General agent, yes.

Q. Which is the one that has general agent on it?

A. Here, April, 1936.

Q. And at the time of the first one, you were merely a representative?

A. Representative.

Q. How long were those contracts paid for?

A. Until I put him out of my home.

Q. Instead of getting mixed up in that, could you give me the date?

Mr. Irwin: If your Honor please—
The Court: That is a proper question.

[fol. 342] By the Court:

Q. It was December, 1936, when you separated, wasn't

A. In December, 1936; they were paid up to date until that time.

Q. I know the dates, so you must know it, Mrs. Balanos.

By Mr. Shapiro:

Q. Mrs. Fairweather, you said you placed her contract and your husband had nothing to do with it, is that right?

A. That is correct.

Q. Without getting into those proceedings, is it true or is it not true she came into the divorce proceedings, and testified your husband had sold it?

A. She did not.

Mr. Irwin: If your Honor please, I object to that. I didn't ask anything about divorce proceedings.

The Court: Not today, you didn't.

Mr. Irwin: If he wants to open it up, I have no objection.

By Mr. Shapiro:

Q. You said she had testified to that effect, that he had been the one responsible for her buying the plan?

A. He wasn't in any way responsible.

Q. I said did you hear her testify to that effect in those proceedings?

A. She didn't testify to that effect.

Q. She did not?

A. No. sir.

Mr. Shapiro: All right, that is all I want to know. Mr. Irwin: That is all. Thank you, Mrs. Balanos.

[fol. 343] RAYMOND McGraw Brandriff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Irwin:

Q. Mr. Brandriff, you are employed by the Pennsylvania Company, are you not?

A. I am.

Q. Have you at my request the accounts and records of the plaintiffs in this litigation?

A. I do. . . .

Q. Turning to the account of Robert J. Deckert, how much has he paid in?

A. Eight payments at \$10 each, \$80.

Q. Has he made any withdrawals?

A. No, sir.

Q. Roland W. Randal?

A. Yes, sir.

Q. How much has he paid in? How many plans has he, or plan contracts?

A. He has two.

Q. Two?

A. On B-13415 he made sixteen payments at \$30 each, or \$480; on A-19528, seventeen payments at \$20 each, \$340.

- Q. Has he made any withdrawals?
- A. He has not.
- Q. David W. Compton?
- A. Yes, sir; A-6265, fifty payments at \$5 each.
- Q. A total of what?
- A. \$250.
- Q. Has he made any withdrawals?
- A. He made two.
- Q. What have they amounted to?
- A. One on November 2d, 1933, of 19,641 shares, and January 30th, 22.272. I don't have the value of the first one—

[fol. 344] By Mr. Shapiro:

Q. What is that, withdrawal or reinvestment?

A. Withdrawal. The value of the second one was \$55. The first one doesn't appear here.

By Mr. Irwin:

- Q. Were those withdrawals of shares made in kind, or did he direct the sale of them?
 - A. They were sold.
 - Q. They were sold?
 - A. They were sold.
 - Q. By the Pennsylvania Company?
 - A. By the Pennsylvania Company.
- Q. How much was remitted to him in cash, do you know?
 - . A. \$55 for the second one. This first one is a new card.
 - Q. Can you figure that out without much difficulty?
- A. There is \$50 on here, I think. That is the amount he withdrew on November 2, 1938.
 - Q. R. G. Cadman?
- A. Cadman, A-10660, thirty payments at \$10 each, or \$300.
 - Q. Any withdrawals on that?
 - A. No.
 - Q. James L. Gleason?
 - A. A-17552, eighteen payments at \$10 each, \$180.
 - Q. Any withdrawals on that one?
 - A. No.
 - Q. Samuel Miller?
 - A. A-6025, forty-four payments at \$10 each, or \$440.

Q. Any withdrawals on that?

A. No.

Q. Irene R. Randal?

A. B-7280, forty-six payments at \$10 each, \$460.

Q. Any withdrawals?

A. No.

Q. Joseph Laky?

A. Thirty payments at \$10 each, \$300.

[fol. 345] Q. Any withdrawals?

A. None:

Q. Abe Zubrow?

A. Fifty payments at \$10 each, \$500.

Q. Any withdrawals?

A. March 8th, 1939, 130.713 Independence Trust Shares were sold. There was remitted to him \$300.

· Q. Has he any balance at all?

A. He has 8.699 shares of Independence Trust Shares.

Q. Have you covered all of them, Mr. Brandriff?

A. Yes, sir.

Cross-examination.

By Mr. Shapiro:

Q. This last party that you talked about that has 8.6, that is Mr. Zubrow?

A. Yes.

Q. I understood you to say he paid in \$500?

A. That's right.

Q. Why has he only gotten \$325?

A. The deductions, service fees-

Q. What is that?

A. Service fee, Trustee fee and insurance premium.

Q. How do you know that?

A. They are deducted.

Q. Can you tell that from anything you have?

A. Yes, we have the amount invested on the card here.

Q. Can you tell what has happened to reduce his \$500 down to, putting it in dollars and cents, to around \$324 or \$325?

A. The card shows he made fifty payments at \$10 each.

Q. Tell the court what was charged against that?

A. There was a \$60 service charge for Capital Savings; there was a \$12.50 Trustee fee, and I can't say what the insurance premiums were, offhand.

Q. Why? Isn't that given on the record here?

A. We don't show the premiums separately, we only show the amount invested.

[fol. 346] Q. There were ten payments, you say, of \$50 each?

A. Fifty payments at \$10 each.

Q. You have charged \$60, and then you charge the Trustee's commission of \$12; that is \$72.

A. That is correct.

Q. Something else must have come off there.

A. Not necessarily. The shares may have been purchased at a higher value than they were when they were sold.

Q. Do you have the record to show at what price those shares were purchased?

A. No.

Q. Does your company figure up the price at which those were purchased?

A. Yes, in our daily record.

Q. In your daily record?

A. Yes.

Q. Does that show as against this particular person how much?

A. The price doesn't show on this card.

Q. That card doesn't show how much this man paid for those shares, does it?

A. Yes.

Q. What did he pay?

A. It shows the various amounts invested each day.

Q. How many shares did he have altogether when he got through paying?

A. 134.412.

Q. In round figures, we will say 140 shares?

A. Yes.

Q. For how much money?

A. For \$500.

Q. I mean after you took off those two items?

A. I can't say. We don't total it here. We put the payments down individually; we don't carry a running total.

Q. Do you know what the price was for those shares on May 8th that were sold, how much per share?

[fol. 347] A. Yes.

Q. What was it?

A. \$2.31.

Q. Do you know to whom those shares were sold?

A. To Independence Shares Corporation.

Q. They were sold to the Independence Shares Corporation?

A. Yes.

Q. I thought you sold them on the open market?

A. We sell to the Independence Shares.

Q. You mean when this man sold these shares of stock, to get his money out they were sold to the Independence Shares Corporation?

A. That is correct. They maintain a market for their

shares.

Q. How do they do that, and how do you know that? How do they maintain a market?

A. It is a custom.

Q. It is? Tell me about this. Without the custom, tell me about this situation. How do they maintain a market for their shares? How is it done?

A. They buy the shares we have to sell.

Q. Do you have an arrangement with them that they will buy all the shares you have to sell?

A. Not all.

Q. What limit have you placed on it?

A. There isn't any limit. We offer them the shares; if they don't take them, we would have to redeem them through our trust department.

Q. How is the price arranged? Who decides what that

price will be?

Mr. Irwin: Give him a chance to answer, Mr. Shapiro. [fol. 348] The Witness: They supply us with a make-up sheet showing the price every day.

By Mr. Shapiro:

Q. Who supplies it?

A. Independence Shares Corporation.

Q. Do you have one of those sheets?

A. No.

Q. Are they available?

A. They are available in our office.

Q. What do they show?

A. They show the cost of the shares, the closing price last night plus the accumulations.

. Q. Less charges?

A. I can't say offhand; that is, the bid price and the asked price includes 7½ per cent of the market value of the shares plus tax.

Q. Tell me that again, I didn't follow that.

A. The asked price, the closing price of those shares-

Q. Which shares are we talking about?

A. The portfolio shares of Independence; plus brokerage, plus accumulation—I may not be correct on the brokerage, but accumulation plus the value, as near as I can remember.

Q. What I am talking about now is when this fellow Zubrow came and said he wanted his money, or he wanted to sell his shares, you found out how much to give him, or, rather, you sold those shares to the Independence Shares Corporation?

A. That's right.

Q. And before you knew how much you would give him for that stock you had some communication with the Independence Company, is that right?

A. Well, that came in along with others for liquidation.

Q. I understand.

A. We lump the shares, what we have to sell, and we call the Independence Shares and say we have so many, [fol. 349] will you buy them. We put them in their account in escrow and charge them for the price shown on the make-up sheet.

Q. What is the scrow account?

A. It is an account they maintain on our books just tohandle the mechanics in buying and selling and liquidation.

Q. That is, the buying and selling of the basic stock?

A. I don't have anything to do with that, that is handled

by the trust department.

Q. Do you keep that sheet they sent to you? For instance, if I wanted to know from your bank how that price was arrived at on May 8th, would that sheet be available to me?

A. On March 8th.

Q. Was it March 8th or May 8th?

A. March 8th, 1937.

Q. March 8th, 1937?

A. That's right.

Q. How far back do you keep those sheets?

A. I can't say off-hand.

Q. I would like, if you could, to produce that sheet so that we could have it offered in evidence.

A. We can produce March 8th.

Q. Now, Compton had some withdrawals, is that right?

A. Yes.

Q. You said he withdrew shares; did he withdraw shares or cash?

A. He had to withdraw shares because we held shares, but we had to sell them.

Q. To whom did you sell those shares?

A. Independence Shares Corporation.

Q. In all cases in these withdrawals, they have been sold to Independence Shares Corporation?

A. That's right.

Q. And when were his withdrawals?

A. November 2, 1938, and January 30, 1937.

Q. What was the price on the January 30th shares?

A. I don't have that on this card. This is a number 2 card, and there is a number 1 card which we don't have here. The price on January 30th was 2.56112.

[fol. 350] Q. 2.56?

A. 112. Q. January 30?

A. That's right.

Q. What was March 8th that you just gave me, the Zubrow?

A. 2.31102.

Q. 2.31?

A. Yes.

Q. And the cost price you don't have?

A. No, I don't have that.

Q. Is that card closed?

A. No, sir.

Q. He still has shares?

A. 2.134 shares.

Q. That is about \$5?

A. About that.

Mr. Shapiro: That's all.

By the Court:

Q. When you say you sold to Independence Shares Corporation from the figures on this make-up sheet, that represented what? The closing price on the previous day?

A. Yes, that represents the closing prices on the previous day. We get that sheet at ten o'clock in the morning.

Q. In the event there are dividends declared between the time of the closing of the books and the dividend date you call that accumulation?

A. That, I think, would be credited on this card.

Q. Against that you charge a brokerage?

A. No.

Q. Assuming there were no dividends, would you sell and charge the brokerage commission, or was that asking price—

A. We merely sold at the bid price.

Q. The bid price reflected the brokerage cost or not?

A. I am not certain about that.

[fol. 351] Q. In other words, I want to know when you sold any Independence Trust shares whether there was a brokerage charge.

Mr. Shapiro: I didn't ask him, Judge, because he was a little hazy on it.

By the Court:

Q. I want to know whether the price represents the closing price on the preceding day plus brokerage or not.

Mr. Shapiro: I don't know whether he means the price mentioned by Independence Shares.

By the Court:

Q. Your bid and asked sheet was bid and asked by the Independence Corporation?

A. That's right,

Q. That was the bid and asked price on the New York Stock Exchange?

A. I am not sure. Some investment trusts include brokerage in bids and some do not.

Mr. Shapiro: That is the reason I asked that he produce a card on this particular one that will explain it.

By Mr. Bohlen:

Q. M. Brandriff, I show you a paper headed "Dividend Payment Order" dated March 28th, 1939, and ask whether that is the form or order you received from holders of

Capital Savings Plan contract certificates who desire the remittance of their dividends and distribution?

A. It is.

By Mr. Shapiro:

Q. That, of course, you only get in cases where there

is no declaration of trust filed, isn't that right?

A. We get those, and if there is a declaration of trust we ask them to revoke it. We will fill out a form and send it to them.

[fol. 352] Q. You ask them to revoke the declaration of

trust?

Mr. Bohlen: Yes, you will find they are revocable.

By Mr. Shapiro.

Q. Why do you do that?

A. Because the declaration of trust states they agree to add income or distribution to the corpus of the trust.

Q. Who agrees to do that?

A. The investor when he signs the declaration of trust.

Q. Then you ask him to revoke that, why?

A. If he wants the dividend remitted.

Mr. Bohlen: I would like to have this letter marked for identification and have the Court's permission to offer a photostatic copy of it in evidence because this is our original record.

The Court: Have it marked for identification.

(A letter was marked Pennsylvania Company Exhibit No. 1 for Identification.)

By Mr. Shapiro:

Q. What about this application which provides the prop-

erty shall be trusteed and reinvested?

A. We abide by the provisions in the declaration of trust. If they don't revoke it we make the check out to them as trustee for.

Q. Who instructed you in that?

A. Our counsel.

Q. Your counsel?

Mr. Bohlen: I think I can explain it.

By Mr. Shapiro:

Q. We ought to have that explained. When was that begun, do you know?

A. I couldn't say.

Mr. Shapiro: Can you tell us?

Mr. Bohlen: I don't know; quite a while ago. In view of the fact that one of the provisions in these declarations [fol. 353] of trust is that the distributions are to be remvested, when a certificate holder wants to get his income for himself, personally, it is obvious that he can't get it personally without breaching that trust he has on file with us. In order that the dividend may be remitted to him personally, we require that he revoke the declaration of trust he filed with the Pennsylvania Company.

By Mr. Shapiro:

Q. Does it stay revoked, then, or only for that one time? A. It is revoked permanently. He has the privilege of reinstating it,

Mr. Bohlen: As I understand it, it is revoked permanently. Mr. Shapiro: Does Capital Savings Plan have to consent to that?

Mr. Bohlen: Not in my opinion.

Mr. Shapiro: All right. That is all, Mr. Brandriff. Mr. Barba.

Mr. Irwin: If your Honor please, I have at the request of your Honor, prepared income account statements. The first one is for Independence Shares Corporation of Pennsylvania from June 13, 1935, which was the time that that corporation was organized. I am referring now to Independence Shares Corporation, the Pennsylvania corporation. That statement is by years, and attached to which is the operating expenses which are summarized in the breakdown of the operating expenses.

I have also furnished a similar statement for the months of January and February, 1939, which is of the Independence Shares Corporation of Pennsylvania, which, as your Honor knows, is the merged corporation formed by the [fol. 354] merger of Capital Savings Plan, Inc., and Inde-

pendence Shares Corporation.

I have likewise prepared, or had prepared income statements of Capital Savings Plan from the date that corporation was organized, October 15, 1931, down to date, that is down through 1938. For January and February of 1939, of course, the operations of that company are reflected in Independence Shares Corporation.

I have also prepared at your Honor's request a statement showing the officers of the company and the salaries that they have received from September, 1931, down to February 28, 1939. That statement shows the compensation received from Capital Savings Plan, Inc., and the compensation received from Independence Shares Corporation. I have also included a statement showing the commissions received by them on personal sales of contract certificates where they negotiated and made the sale, so that that will show completely everything that hey have received either from Independence Shares Corporation of Pennsylvania of Capital Sarings Plan, Inc.

If your Honor please, this detailed information which we have furnished, of course, gives the complete story of our business. I do not want to offer it in evidence. If your Honor wants it, I do not object to furnishing it to your Honor.

The Court: Why shouldn't it be in evidence?

Mr. Irwin: I don't think it is incumbent on me to produce and offer in evidence the salaries of our officers. I do not think that the operating statements of the company are relevant to this extent, sir, that the question as I see it on insolvency is whether we are solvent or insolvent now, depending on our assets and liabilities.

The Court: It is more than a question of solvency or insolvency where there is a question of receivership. It goes to the question of management also.

[fol. 355] Mr. Irwin: I don't think this is a stockholders' bill. I have no objection. I have furnished it. I have put it in tabular form. I have tried to make it available to your Honor in a way that would be easiest for you to analyze it.

I have already sent to your Honor a copy of our balance sheet as of February 28, 1939, and I don't know whether that is officially a part of the record, or not, but I think it should go in certainly with this data, if your Honor wants to have it as part of the record.

The Court: I will direct that the financial statement which was submitted by you as well as these statements, that is, profit and loss statements and these various papers which I requested, be given to the stenographer and be marked for identification and to be placed in the record and made part of the record in this case.

Mr. Irwin: Very well.

(A paper entitled "Income account Independence Shares Corporation (Pennsylvania (From June 13, 1935 to December 31, 1938)" was marked Defendants' Exhibit 16.)

(A paper) entitled "Operating expenses Independence Shares Corporation (Pennsylvania) (From June 13, 1935) to December 31, 1938)" was marked Defendants' Exhibit 17.)

(A double sheet entitled "Income Account Capital Savings Plan, Inc., from October 15, 1931 to December 31, 1938" was marked Defendants' Exhibit No. 18.)

(A double sheet entitled "Operating Expenses Capital Savings Plan, Incorporated (From October 15, 1931, to December 31, 1938)" was marked Defendants' Exhibit No. 19.)

(A sheet entitled "Income Account Independence Shares Corporation (Pennsylvania) for January and February, [fol. 356] 1939," was marked Defendants' Exhibit No. 20.)

(Eleven papers entitled "Officers' Compensation were marked D-21 to D-21j.)

Mr. Irwin: If your Honor please, in my letter to you of April 5th in which I enclosed a copy of the balance sheet, I offered an explanatory statement with regard to this item of contingent liabilities. In case your Honor is not familiar with, or does not recall what I am referring to, I would suggest that that also be made a part of the record.

The Court: You made the statement that there was a con-

tingent liability of \$3,486,000.

Mr. Irwin: No, I said in all these companies, all these plan companies, as a result of the S. E. C. ruling and investigation, there is an item of contingent liability in the amount contained in the prospectus of these similar companies.

The Court: In your case it is \$3,486,000 plus an approximate additional one-half million.

Mr. Irwin: \$3,486,000-

Mr. Barba: I thought it would be minus one-half million.
The Court: According to your statement of February
28th——

Mr. Irwin: Tam referring to the fact that this same course of procedure regarding contingent liability—

The Court: What does the contingent liability mean?

Mr. Irwin: Contingent liability means that if everybody who bought and paid for shares from us, on the payments [fol. 357] they made to us, that, if they sue us and they recover from us then they would be able to establish a liability. It means nothing more than that. It was installed or put in there. As far as an actual liability, it means no more, in my opinion than such an item would appearing in a statement of Morgan, Stanley. In other words, under the law, as I conceive it, under the S. E. C. law, every person who sells a security has a contingent liability within a certain time that they may be sued.

The Court: How would that operate?

Mr. Irwin: Which one?

The Court: You have an approximate three and one-half million dollar contingent liability—

Mr. Irwin: I can best illustrate the actual operation for your Honor—is my letter there?

The Court: Yes.

Mr. Irwin: —by stating that from June 14, 1938 down to the present date the amount paid on account of that contingent liability is \$279.34.

The Court: Assuming it was more, assuming for the sake of argument that the plan holders could successfully maintain suits and recover judgment against the Independence Shares Corporation—

Mr. Twin: Of course, if your Honor please, I can't go along with you on the assumption that they could.

The Court: Well, assuming they could.

Mr. Inwin: Assuming that they could, then they would establish a claim against Independence Shares Corporation in the amount of their particular claim, which would depend on the amount that they had paid, and the present value of the shares.

[fol. 358] Understand, if your Honor please, that this \$3,486,000 does not reflect any claim for any shares of stock.

The Court: I understand that, they couldn't have the penny and the cake, too. They would have to turn their

stock over to you.

Mr. Irwin: Right. As to your question, I couldn't say. You have asked me a hypothetical question. I couldn't answer that without taking it as of a date, say as of today's date and fixing the value of those shares which would be offset against them. We do know that from our experience and from the number of claims that have been made and from the number of payments that have been granted, that this so-called contingent liability is more theoretical than real.

The Court: Isn't it something that is put on the prospectus to make the prospectus inviting to the plan holder or prospective plan holder to say that this company is contingently liable?

Mr. Irwin: No, it is not. If your Honor please, we didn't put that on; the only reason it was put on here is because

The Court: To comply with the requirements of the Securities Act.

Mr. Irwin: -because the S. E. C. required that of every

similar company.

The Court: Assuming there was a three and a half million dollars of a contingent liability, assuming that you had suits brought against you and that there was a recovery, assuming you had say four million dollars worth of stock in the custody of the Pennsylvania Company applicable to the satisfaction of those claims—when I say four million dollars, I mean of a cost of four million dollars—and at the time it [fol. 359] was required to satisfy those judgments the market value of that stock would be under three and a half million dollars, or anything less than four million dollars, how would you satisfy them? You have contingent liabilities of three and a half million. Suppose you could convert. or sell the shares which are now in the plan say for \$3,-250,000; that really is not beyond imagination, in view of the sharp decline we have had in the stock market the last month or two months

Mr. Irwin: I can only say this to your Honor, that as I have already said, that the actual amount paid out was \$279.34, and we have had a general decline in the market for the last six months. Everyone has been apprised and advised of this.

The Court: I am not saying there is any concealment. You don't understand me. I am not charging any misconduct on the part of the company.

Mr. Irwin: I know that, sir, but I say this to you, we must

judge these things in the light of our experience—

The Court: May I interrupt you a second?

Mr. Irwin: Yes, your Honor/

The Court: You sold \$762,000 of your securities for \$662,000. As a result, there was a loss of approximately \$100,000. In addition to that, there was the reinvestment of a given portion of that \$662,000, there was a seven and one-half per cent overwrite approximating another \$35,000, so that the stockholders or plan holders had put back in their portfolios securities of a value of approximately \$135,000 less than the securities that were there before they were sold. Do you follow me?

Mr. Irwin: Well-

The Court: Do you just follow that part of it? [fol. 360] Mr. Irwin: Let me point this out to your Honor. The first part of your proposition that the cost of these securities was \$100,000, but the value was not \$100,000 greater than the value at the time they were sold—

The Court: They were charged \$762,000 for them.

Mr. Irwin: That is the cost.

The Court: That was the value of their property.

Mr. Irwin: The value of their property was the value as of the date that these securities were sold.

The Court: I am speaking of the \$762,000 that was paid by the plan holders for these securities, according to the statement you have made. That is at the time these seven securities were taken out of the portfolio.

Mr. Irwin: \$763,655.33 and \$652,000 were the figures I

gave your Honor.

The Court: I was keeping it in round figures, I said \$763,000. Was that the cost of the securities to the plan holders?

Mr. Irwin: That was the cost of the underlying securities that were sold.

The Court: Cost to whom?

Mr. Irwin: Cost to Independence Shares Corporation.

The Court: Then that is not what I asked for. I asked what the price was, the aggregate at which the securities were put into the portfolio.

Mr. Shapiro: That was even more.

Mr. Irwin: They were put in at \$763,655.

[fol. 361] The Court: Let us agree on it. They were put

in the portfolio at \$763,000?

Mr. Irwin: I want to point out to your Honor that that money, that represented the total cost of these securities for Independence Shares Corporation which sold shares not only to plan holders, but shares were sold to others.

The Court: Who were the others?

Mr. Irwin: They were people who bought Independence Trust Shares independently. Independence Trust Shares were sold in the open market.

The Court: Whether you call them plan holders or any-

thing else, someone held them and they paid \$763,000.

Mr. Shapiro: Plus commissions.

The Court: I don't want to get into such details. I think, according to my understanding, that \$763,000 was the complete cost reflecting whatever underwriting there may have been, seven and a half or nine per cent, and reflecting the cost of the brokerage in the purchase of the stock. Is that correct?

Mr. Irwin: I would rather ask Mr. Geary about that.

Mr. Shapiro: If you will look at the books, you will see it says that is the cost of the stock that was bought, then Independence Shares of course added \$763,000 plus seven and a half plus commission.

The Court Perhaps I misunderstood it.

Mr. Shapiro: That's what it was.

Mr. Irwin: That is the cost at the time of the deal.

The Court: Cost to whom?

Mr. Geary: Cost to the depositor corporation.

[fol. 362] Mr. Irwin: Independence Shares Corporation.

The Court: What was the cost to the plan holder?

Mr. Shapiro: Even more.

Mr. Geary: The market price on the day of purchase.

The Court: What was it?

Mr. Geary: It may be more or it may be less.

Mr. Shapiro: The market price plus the charges.

The Court: I wasn't given, then, what I asked for.

Mr. Irwin: Your Honor please, it was the cost that these

Mr. Irwin: Your Honor please, it was the cost that these securities went in.

The Court: That is just what it is not, according to your prior statement.

Mr. Bonner: It is practically impossible to figure it. This cost, I might say, is figured for income tax purposes. It

was necessary to set that up at the request of those officials.

It is on the basis of first shares in, first out.

The Court: Let me find out about this. Is \$763,000 the cost of these seven securities to Independence Shares Corporation before they went into the portfolio of the plan holders?

Mr. Bonner: No, sir, it is the market value of the securities as of the date the trust shares were issued against them.

The Court: Doesn't that mean the same thing? Doesn't that mean the cost at which they went into the portfolio?

Mr. Bonner: No, there may be a difference between the cost on the day they are acquired and the day they are deposited—

[fol. 363] The Court: I thought they went in at the market value of the day before. That's what was said.

Mr. Bonner: They are sold to the investor at the closing

price. The investor pays that.

The Court: What is that \$763,000? Is that the price at

which they were sold to the investor?

Mr. Bonner: That is the price of the stock on the day when the underlying securities were deposited with the Pennsylvania Company.

The Court: That means then it was the cost to the inves-

tor.

Mr. Bonner: Not necessarily.

The Court: What is it?

Mr. Bonner: The cost to the investor would be the price plus the mark-up of seven and one-half per cent.

Mr. Shapiro: Plus the increase in price. If the price went

up or if it decreased-

Mr. Bonner: That's right.

The Court: Well, now, what is it?

Mr. Bonner: That is the cost plus-

The Court: We know seven securities were sold and they yielded \$662,000. We know that.

Mr. Bonner: Yes.

The Court: Therefore the plan holders and others—when I say "others" I mean others than Independence Shares Corporation—they sold what they had for \$662,000. Is that correct?

Mr. Bonner: Yes.

The Court: What did that cost them?

[fol. 364] Mr. Bonner: The only cost figure that has ever been compiled is \$763,000.

The Court: It may be more than \$800,000, is that correct?

Mr. Irwin: No, it couldn't.

Mr. Shapiro: Seven and a half per cent of \$763,000 is at least over \$40,000, close to fifty-five or sixty. That cost alone was added to anyone who bought.

The Court: Is that right or not?

Mr. Bonner: That is possible.

The Court: There was the write-up on the \$763,000 of at least 7½ per cent, wasn't there?

Mr. Bonner: Yes, that would be correct.

Mr. Shapiro: And nine, depending on when they were bought; maybe nine; under the Capital Savings Plan—

The Court: That would be \$57,000. I am taking the 7½ per cent figure. That would be an overwrite of \$57,000.

Mr. Bonner: All right.

The Court: And \$763,000, that would be a cost of \$820,000 to the plan holders. Isn't that correct?

Mr. Bonner: Yes, sir. I agree with your figures.

The Court: I don't want to lead you to make an erroneous estatement.

Mr. Bonner: This cost figure is an accountant's computation. There is no way to get the exact cost. You add the shares that were outstanding at the end of the business day for income tax purposes; this cost was calculated on the basis of first shares in first out.

[fol. 365] The Court: That \$763,000 was the cost to the Independence Shares Corporation on the day when the stock went into the plan holders portfolio.

Mr. Bonner: On the basis of first shares in first out.

The Court: Therefore the plan holders would have to pay the 7½ per cent to get it from the Independence Shares Corporation to their own portfolio.

Mr. Bonner: Yes.

The Court: That would make it \$57,000 plus \$763,000, or about \$820,000.

Mr. Bonner: Yes.

The Court: And the plan holders received \$662,000 when the securities were sold.

Mr. Bonner: That is correct.

The Court: That is a difference of approximately \$158,-000. When these seven securities were sold what propor-

tion—that was \$820,000, the cost at which they went into the portfolio. The portfolio at that time contained stock at a cost of what to the plan holders? In the neighborhood of \$4,000,000, was it?

Mr. Bonner: Yes, I would agree, your Honor, at the time of the sale; over \$4,000,000, I would say four and a half million dollars.

The Court: That would be approximately 20 per cent of

the money value of the portfolio was sold?

Mr. Bonner: Yes, I believe so.

The Court In the event it was all sold there would be a loss, if they had all been liquidated at that time, there would be a loss of five times \$158,000?

Mr. Bonner: Not necessarily.

[fol. 366] The Court: Assuming they all had been sold at that time.

Mr. Bonner: Assuming the losses on the remaining securities would be equivalent to the loss on the seven in proportion?

The Court: Assuming that.

Mr. Bonner: Each security can be calculated separately. The Court: That would be a loss of \$790,000; five times \$158,000 would be \$790,000. I understand that there are variable factors, it is likely—I won't say that, strike that out—it is possible that the other securities may have been sold at a profit and not at a loss, but assuming that what happened in the case of these seven securities, that the same facts were true with regard to the remaining thirty-five securities that were retained, assuming that the same loss would have happened in the sale of those thirty-five securities as was in the case of the seven securities that were sold, you would have had a loss of \$790,000. Do you follow me?

Mr. Bonner: Yes, sir.

The Court: Assuming that that had happened, what would your contingent liability mean if you had stock of a market value of \$800,000, approximately, less than the cost, and assuming you had judgments against you and you would then take that stock over and you would have stock worth \$800,000 less than cost, what would the contingent liability mean in that case?

Mr. Irwin: If your Honor please, your Honor makes assumptions, and of course, if you want to assume, you can assume based on the report of Mr. Porteous which he furnished in January of 1939, the securities had a greater

[fcl. 367] value, the underlying securities had a greater value than the cost of them.

The Court: I am also familiar with the fact that since February when the computation was made as to the market value of the securities that there had been a considerable decline in the stock market. That situation no longer holds true, although the values given by Mr. Porteous in his computation were true at that time, they are not true today.

Mr. Irwin: But I think that we can assume, for the purpose of experience, that the securities that we sold here, and for the reasons that they were sold, probably declined far more in market value than the other securities.

Mr. Shapiro: That is not so.

The Court: Won't you let me get one thing clear in your mind? I am not making any criticism of the sale of the seven securities which were sold, either as to the method of selection of these particular securities—I have no criticisms to make. That was in the exercise of the best judgment of Mr. Porteous and best judgment of the directors of the corporation. Assuming that—I am discussing the situation from this standpoint, if the same thing happened to all the securities, what would be the result as far as the plausholders were concerned? Let me take the particular securities which were sold at a loss of \$158,000. Assuming that your other securities left in the portfolio were sold exactly at cost, their value today was exactly what they cost, there would be a loss of \$158,000 of the total amount of the investment, is that correct?

Mr. Irwin: There is a loss of \$100,000-

The Court: \$158,000.

Mr. Irwin: By reason of the reinvestment of that money, they pay in addition \$35,000 or whatever that amount is. [fol. 368] Mr. Geary can tell you. Seven and a half per cent—

The Court: \$57,000.

Mr. Irwin: \$57,000. But that \$57,000, we are not entitled to a penny of that if they direct that they want to receive their money in cash, and some of them—

The Court: We are discussing two different things. I am not taking into account the 7½ per cent which was charged on the reinvestment of the \$662,000. If I did that my \$158,000 figure would be swelled by some \$35,000 additional. I am not doing that. The 7½ per cent is only taken

into consideration where it is actually applied, that is, in the case of the investment of the \$763,000.

Let me tell you what I am getting at. There was a loss taken, assuming that the \$663,000 had been dispersed in cash, that there is a loss of \$158,000; assuming that the rest of the securities, of the thirty-five securities in the portfolio had the same market value today as the cost price to the investor, you would have a loss of \$158,000. You would have to pay out \$158,000. You would have to pay out \$158,000 if these people got judgments against you. How would you get that \$158,000? What would your contingent liability mean in the case of a corporation that has, according to its statement, \$84,000 as your total assets position, of which \$37,000 is good will, leaving a balance of \$47,000 in assets, assuming that those assets were reliable at one hundred cents on the dollar? What would your contingent liability mean?

Mr. Irwin: Our contingent liability means this, that before anybody can recover they must show that they come within the purview of the Securities and Exchange Act. [fol. 369] The Court: That is not the answer.

Mr. Irwin: Let me finish.

The Court: I am assuming that they obtain judgment.

Mr. Irwin: If you are going to assume that these people obtain judgment, you ask me how am I going to pay \$158,000 with \$40,000. I can't do it, nor can anyone.

The Court: All right.

Mr. Irwin: But I say that you can't just assume that when in the light of the experience of this company, this liability, ever since it has been in effect, since June 14, of 1938, that in that time we have paid out \$279 and we have no suits pending other than this present suit, and I don't think your Honor can assume that. Your Honor is asking me to assume those things which I know from my experience and from my judgment are theoretical, because your Honor must realize that if people were dissatisfied with those things, if people felt that they had not been treated properly they would not have continued to pay and to pay and have continued to pay after notice of this thing. They all had notice of this suit; they all received copies of the new prospectus.

The Court: You and I are talking about two different things.

Mr. Irwin: Yes, but I want to get out of your Honor's head, if I can, the fact that this is a contingent liability doesn't necessarily establish it as an actual liability. Your Honor asked me——

The Court: Of what value is a contingent liability to a plan holder, or what you said is a contingent liability on the part of a company with assets of \$47,000, or net assets of [fol. 370] \$37,000 where you have a contingent liability of \$3,486,000?

Mr. Irwin: Every security dealer in the United States has a contingent liability equal to the amount of securities he sells.

The Court: If the Securities Commission permits those conditions to prevail, the Securities Commission, is guilty of a fraud upon the investors of this country. I make that statement without reservation or qualification. The Securities Commission is guilty of a fraud on the innocent investor if they permit this company or similar companies to have a contingent liability of \$3,480,000 and assets of a net value of \$37,000, assuming those assets are worth one hundred cents on the dollar.

Mr. Irwin: They have investigated this whole matter.

They have ruled on it.

The Court: Don't you understand I am not speaking merely of your own corporation? I am speaking of the set-up which is allowed to apparently prevail, because there has been no action taken by the Securities Commission. That is true with respect to every other corporation similar

to yours. Understand that.

Mr. Irwin: If your Honor please, I think in this case you must consider this fact, that purchasers of securities received, when the Securities and Exchange Act was passed, certain rights which heretofore they hadn't had, and therefore, I think that is all that the contingent liability means, that we are subjected to the possibility of suit. That possibility has not become an eventuality in any substantial way whatever, as far as our own experience is concerned, and I think it has been the experience of similar companies.

The Court: Will you give me those statements, after you

have them marked for identification?

[fol. 371] Mr. Shapiro: On this income, I would like to know what is meant so that your Honor can get it, by this profit on securities of \$121,000 and commissions allowed \$101,000.

The Court: You may ask that question.

Mr. Shapiro: I don't know whom to ask the question.

The Court: Mr. Irwin is here.

Mr. Shapiro: I don't understand this income account. Your statement says "Profit on securities including Independence Trust Shares net of expense of Trading Department, \$121,000."

Mr. Irwin: In 1937?

Mr. Shapiro: Yes. Beneath that it says, "Less commission allowed on sales of Independence Trust Shares \$101,982."

Two questions arise in view of all this, because this doesn't show the income entirely, it doesn't show the Trading Department income, which is a part of this company. It says, "including Independence Trust Shares net of expense of Trading Department," which indicates you haven't got the Trading Department in there.

Mr. Ross: Yes, it does. It says, "Profit on securities." Mr. Shapiro: It also says, "net of expense of Trading

Department."

Mr. Ross: The expense of the Trading Department has already been taken off from this profit under salary of trader and telephone bills and so forth, a very small amount.

Mr. Shapiro: Salary of a trader?

The Court: Is that shown on this statement?

[fol. 372] Mr. Shapiro: Yes. What is the other \$100,000? Is that an expense also?

Mr. Ross: That is commission paid out.

Mr. Shapiro: To whom?

Mr. Ross: In this case commission allowed on sales of Independence Trust Shares.

Mr. Shapiro: Commission allowed to whom?

Mr. Ross: To brokers who have sold Independence Trust Shares, assuming that some part of it was paid to Capital Savings Plan.

Mr. Shapiro: I think your Honor ought to know this. Here is a statement which shows a gross profit of \$19,000 for 1937. I have asked how they show on their income account for the year \$121,000 income and \$101,000 expense? How can there be \$101,000 worth of commissions on these shares? This statement doesn't explain anything. —Who got the \$101,000?

The Court: If it is not clear in my mind, I will direct that there be another hearing had. I have not attempted

to analyze these statements within the short time that was available here to do so.

Mr. Shapiro:-Your Honor has the people here. You will only take one glance at this statement and you will see it does not give the information asked for.

The Court: What are you referring to?

Mr. Shapiro: This sheet headed "Income Account" at the end of 1937, August 31, it shows \$121,000 income, and that there was deducted \$101,000 as commissions. I don't know that this company paid any commissions for selling the Independence Trust Shares, but if it did, I would like to know to whom. I would like to know what the \$121,000 represents.

[fol. 373]. The Court: Mr. Irwin, do you have someone here who can answer that?

Mr. Irwin: ,Yes, Mr. Geary.

ALFRED H. GEARY, recalled.

Cross-examination.

By Mr. Shapiro:

- Q. Mr. Geary, the sheet headed "Income Account Independence Shares Corporation" from June 13, 1935 to December 31, 1938 marked Exhibit D-16—have you a copy of this?
 - A. Yes.

Q: What does that \$121,167.41 mean?

- A. That is the gross profit to the Independence Shares Corporation and the mark-up, existing mark-up at the time of the trust shares—
- Q. In other words, the Independence Shares Corporation bought a lot of basic stock?
 - A. Yes.
- Q. And deposited it with the Trustee as we have seen here?
 - A. Yes.
- Q. And then sold Independence Shares to plan holders, and in the sale there is a difference between the price or cost at which you put it in the Trustee's hands and the price at which you sold it to the plan holder, in which you made \$121,167, or you earned, I should say?

A. We have to pay a commission, as the prospectus describes, and as it was brought out—

Q. Let us deal with the first amount, \$121,000.

A. That represents a 9 per cent gross profit.

Q. Nine per cent mark-up?

A. Yes.

Q. Plus, if there is any, the difference between the price at which you bought it and the price at which you charged it on the day of the sale?

[fol. 374] A. Our experience has been that we have lost money in the creation of trust shares consistently; by that I mean that the price paid has been higher than the price at which they were bought.

By the Court:

Q. Where is the result of that reflected in the statement? A. It doesn't show.

Mr. Shapiro: That is what I am trying to point out.
The Witness: We did describe it in our later prospectus.
We had a calculation made by Lybrand, Ross Brothers and
Montgomery.

By Mr. Shapiro:

Q. But you have not disclosed your profit and loss in the trading account?

A. No.

By the Court:

Q. Why isn't it in the Statement?

A. It is in there.

A Voice: It is part of the figure.

By the Court:

Q. In other words, that is the net result?

A. Yes.

By Mr. Shapiro:

Q. It includes the profits or has taken into account the losses?

A. Yes.

Q. There is nothing in this statement that shows whether you made a profit or a loss in 1937?

Mr. Irwin: As to what?

By Mr. Shapiro:

Q. There is nothing in the paper you furnished to the Court today which shows whether your trading account shows a profit or loss?

[fol. 375] A. Is it relevant?

Q. You answer the question. Does it show it?

A. I think not.

Q. Tell us what the \$101,982.96 deduction under that same

item of \$121,000 means?

A. The bulk of that was paid to Capital Savings Plan under an arrangement, and I believe it was at that time 1½ per cent which was retained by Independence Shares Corporation and 7½ per cent paid to Capital Savings Plan.

Q. Then the Court understands that as far as the arithmetic is concerned, the 1½ per cent is approximately \$19,-

0001

A. Yes.

Q. And the \$101,000 is-

A. Seven and one-half per cent.

Q. Where is this \$101,000 of disbursements shown?

A. You will see that in the Capital Savings Plan statement.

Mr. Irwin: What year is that?

Mr. Shapiro: 1937.

By Mr. Shapiro:

Q. What is this "Account Plan incorporated"? Is that Capital Savings Plan?

A. What?

Q. The words "Account Plan incorporated," what is that on one of these exhibits?

A. Wait a minute.

Q. Tell us what "Account Plan incorporated" means on one of these exhibits?

A. I don't know. You better ask the treasurer.

Q. Oh, I see, it is two sheets put together, and it should be "Income Account Capital Savings Plan, Inc., from October 15, 1931 to December 31, 1938." Does your Honor follow that? If you take the same year, ending August 31, 1937 for the Capital Savings Plan it shows an income of \$420,460.48? [fol. 376] A. Yes.

Q. What does that come from?

A. Wait a minute. That was from the deductions on plans sold.

Q. Deductions on plans sold?

A. Yes.

Q. I don't follow that.

A. You know there was about sixty cents service fees deducted.

Q. In other words, the Independence charged a 9 per cent mark-up and Capital Savings Plan got the deductions?

A. That's right.

Q. The \$60 and other deductions?

A. Yes.

Q. The \$420,000 represents the deductions plus the \$108,000 you got from the Capital—

A. It so happens that out of that we got \$98,000. The balance was paid to other companies who were using our shares.

Q. In the \$420,000 it includes the 7½ per cent, your share of the 7½ per cent of the Independence Shares Corporation less some deductions you want to tell me about, is that right?

A. No.

Q. Doesn't the \$420,000 include that?

A. You will see that on line three.

The Court: The total here shows \$518,000.

By Mr. Shapiro:

Q. The gross commissions were \$518,000?

A. Yes.

Q. Who got the other deduction, the difference between the \$98,000 and the \$100,000?

' A. I assume that was paid out to Income Foundation, Inc., or National Plan, Inc.

Q. Was that another subsidiary of your company?

A. No, sir.

[fol. 377] Q. Another purchaser?

A. Another plan company, distinctly independent altogether.

Q. This item in 1937 was subject to a deduction of \$320,000. Is that for agents and salesmen's commissions?

A. Yes.

Q. That went to the people who sold the contracts?

A. That's right.

Q. Who got the \$185,477?

A. Who got what?

Q. The \$185,477, the item that is called operating expenses. That's right, isn't it?

A. Did you ask a question there?

Q. Yes. I can withdraw it for a minute. You have now a list of expenses, operating expenses before you, of Capital Savings Plan?

A. Yes.

Q. For 1937. I notice an item of \$22,278.59 for professional and special services. That is No. 12.

A. Yes.

Q. What is that for?

Mr. Irwin: If your Honor please, I thought Mr. Shapiro was going to ask Mr. Geary one or two questions. If he wants to go into a detailed examination, I can put the treasurer on. I think the statement speaks for itself.

By Mr. Shapiro:

Q. What is your office?

A. President.

Q. Don't you as president know what you paid \$22,000 for legal expenses for?

A. I can't itemize all of the expenses.

The Court: It is immaterial. Put the treasurer on.

Mr. Shapiro: Put the treasurer on.

The Court: Costs and expenses over a period of years, he may not remember them all.

[fol. 378] ROBERT A. BONNER, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shapiro:

- Q. Mr. Bonner, you are treasurer of what company?
- A. Independence Shares Corporation.
- Q. I notice that-

Mr. Irwin: If your Honor please, for the purpose of having the record straight I would like to just register an objection to this line of examination as to its relevancy. I won't repeat it and interrupt the examination any further.

The Court: I will overrule the objection and grant you

an exception.

By Mr. Shapiro:

Q. I notice in 1937 the item of legal expenses and professional expenses jumped from \$5000 in 1936 to \$22,000 in 1937. What was the reason for that, do you know?

A. No, I can't tell you offhand.

Q. Who made up this report?

A. I did.

Q. If you made the report up didn't you get any of the information in making it up?

A. Not the details. It was made up from Lybrand's

reports.

Q. Haven't you any idea why it jumped up \$17,000? What is your answer?

A. We have the details in the books of the company.

Q. Surely you are familiar with them, being treasurer, you are familiar with how that jumped up \$17,000?

Mr. Irwin: I want to object to that statement. No man can be expected to carry the details of these figures in his head.

The Court: All he will have to say is "I don't remember" if he doesn't remember. I am not going to do anything about it.

[fol. 379] By Mr. Shapiro:

Q. What do the professional and special services refer to, legal services?

A. Legal and accounting services.

Q. Do you know who the people are who received those \$22,000—some of them?

A. No, I couldn't tell you.

Q. In the last year, in 1938?

A. I could tell some of them.

Q. Who were they?

A. Townsend, Elliott and Munson, attorneys; Lybrand, Ross Brothers and Montgomery.

Q. Accountants?

A. Yes. There may be possibly others.

Q. Would you say the major portion went to attorneys or the major portion went to accountants?

Mr. Irwin: He said he didn't know.

Mr. Shapiro: If he will say he doesn't know, he will save us a lot of trouble.

The Witness: I don't know.

By Mr. Shapiro:

Q. Do you know anything about the next year's item of \$14,000 expense for the same item?

A. I don't know.

Q. I now call your attention to line No. 1 entitled "Officers Salaries" and line No. 2 "Office and general safaries," do you know anything about the details of that? Why those two items were separated?

A. One covers the officers only.

Q. Salaries of officers alone?

A. Salaries of officers alone; and the other covers the

salaries of the other office help.

Q. Can you tell us—if you don't know, say so—can you tell us how it is that that item jumped from \$9,000 in 1936 to \$24,000 in 1937?

[fol. 380] A. Only in a vague way.

Q. Wait until I finish. It wasn't your fault, it was my fault. I hesitated a little. And why it was \$34,000 in 1938?

A. Only in a vague way, but your help has to be increased as your business increases and the volume of work that has to be handled requires the employment of more—a greater number of individuals. Also, because of the fact in better years you are inclined to compensate the employees a little bit better than you do in ordinary times.

Q. Are the salaries for 1939 being paid on the same basis

as the salaries for 1938?

A. No, sir.

Mr. Irwin: I think I gave the details of that. Mr. Shapiro: I think we have that somewhere.

By Mr. Shapiro:

Q. I would like to ask you, Mr. Treasurer, while you are on the stand, whether or not the trading account is kept separate so that the profits or losses can be ascertained?

- A. Separate records were kept of the trading department.
 - Q. In the \$121,000—

A. I can say this, if you want the separate figures of the trading department I feel confident I can get them for you.

Q. The \$121,000 profit or income, as it is called, in 1937, includes the profits or the losses, whichever they were, of the trading account, is that correct?

A. That is correct, and applies to other years as well.

Q. Do you know whether in 1937 you made a profit or not, generally? I am not asking you the amount?

A. On the trading department?

Q. Yes.

A. I couldn't tell you.

Q. Is it a fact you did trade in the stock in addition to selling the plan?

[fol. 381] A. Yes, we had an employee—not in stocks—who traded in trust shares other than Independence Trust Shares?

Q. For his benefit?

A. For the benefit of the company.

Q. What was the fellow's name?

A. Clifford Kief.

Q. Tell us what he did. Explain it to the Court.

A. Well, he had a couple telephones and a switchboard, and they gave him a direct telephone connection with other brokers. He was an expert in trading in trust shares. He could find a market for trust shares if anybody had them for sale, or find shares in case anyone wished to buy them.

Q. All right.

A. The brokers would call him up and give him their orders and he would go into the market and buy from a second broker and fill the order and make a small profit for the company.

Q. Yes. What did you pay him for-how was he paid

for his services?

A. He was paid a straight salary.

Q. How much?

A. \$150 a week was the peak pay.

Q. When he sold those shares were there any commissions paid?

A. No, sir; none at all.

Q. Were there any commissions charged to the purchaser?

A. No, sir.

Q. Are you sure of that?

A. You are talking—you are thinking about Independence. I have been talking about the other shares.

Q. I am thinking about the shares which were sold.

A. The shares that he sold to other brokers, there was

no commission paid or charges attached.

Q. Which of the shares was it you charged a commission and the commission was paid to Kief outside of the salary? [fol. 382] A. That was probably Independence Trust Shares.

Q. Explain that to us how that was done.

A. Mr. Kief would buy the shares generally at a price maybe four or five cents above the actual market price of the shares.

Q. Yes.

A. And that way he more or less assured himself the shares on the market would come into the possession of the company. They would come there eventually anyway. The company would sell those shares as they had orders for them to individuals making payments under Capital Savings Plan certificates.

Q. Yes.

A. And whenever shares were sold, the price was calcu-

lated to include the 7½ per cent mark-up.

Q. Yes. To come to a specific Independence share, it was bought by Mr. Kief and then when it was sold it was sold by him, by the company to the plan holder and the 7½ per cent mark-up put on that share?

A. The share would be sold to the Pennsylvania Com-

pany for the account of the plan holder.

Q. Who delivered it to the plan holder, the Pennsylvania Company?

A. Yes. Whenever shares were sold in that manner the price was computed with the mark-up of 7½ per cent.

Q. That had nothing to do with the basic shares at all?

A. No, it was secondary.

Q. That dealt merely with the certificate itself?

A. Yes.

Q. That means that if Kief bought the share at 1.52 you would sell it to the plan holder through the Pennsylvania Company at 1.52 plus 7½ per cent?

A. Not necessarily. I said that Mr. Kief was accustomed to paying what you may say a little bonus on these shares in order to secure them.

By the Court:

Q. In order to preserve the market? [fol.383] A. Well, it wasn't a question of that.

By Mr. Shapiro:

Q. To make sure you would get the shares?

A. Remove the shares from the market that were offered.

Q. It is another way of saying to preserve the market.

. Mr. Irwin: Let him finish.

Mr. Shapiro: Don't be so finicky.

Mr. Irwin: I think the witness is entitled to finish his answer.

By Mr. Shapiro:

Q. You and I are getting along very well.

The Court: They seem to be.

Mr. Irwin: I think he is entitled to finish his answer without Mr. Shapiro cutting him off.

Mr. Shapiro: When I cut you off, tell me about that. I am the only one in that situation. We are getting along all right, if Mr. Irwin would only leave us alone. You finish your answer, if I interrupted you, please.

The Witness: There were only about two markets for shares, one through the redemption fund and one through the Independence Shares Corporation.

By Mr. Shapiro:

Q. Tell me about that redemption fund. I didn't know about that before.

A. If you held shares, say you had 1000 trust shares, you sent them into the Pennsylvania Company and withdraw the underlying securities.

Q. Yes.

A. Then it would be up to you to deposit those underlying securities through any broker, and if you didn't wish [fol. 384] to do that you could sell the shares to a broker on the street and possibly they would come to Mr. Kief. Some

other broker intercepted them for his customers, and if any came to Mr. Kief he would buy them for Independence Trust Shares.

By the Court:

- Q. He was really there to make a market, wasn't he?
- A. If you want to call it that, I don't see any objection.

Q. That's what it was, wasn't it?

- A. Independence Trust Shares did not need a market in the sense that other securities may need such a market; they have an automatic market.
- Q. It would make a market available if someone wanted it?

A. Yes.

By Mr. Shapiro:

Q. It became known among the brokers that all they had to do was to call up Kief and he would pay three or four points above what was generally offered?

A. Yes.

Q. And you took those very shares and sold them to a plan holder or anyone, if he same in, and added what to the price?

A. We would sell them to the Trustee for numerous plan holders.

Q. And added what to the price?

A. The mark-up.

Q. Which was 71/2 per cent or 9 per cent?

A. Yes.

Q. I didn't get that redemption fund business. What

was the redemption fund?

A. The redemption fund was operated by the Pennsylvania Company, Trustee. Shares coming into that fund may be redeemed by the Trustee in cash or may give them underlying securities.

Q. I am going to ask you one more question and that is when the plan holder bought the shares through the trust company in the usual way, the commission was charged on the basic stock, wasn't it, the brokerage commission in addition to the 71/2 or 9 per cent?

A. The brokerage commission would be paid over daily. The calculation appeared on the price make-up sheet that

is handed to the Trustee every morning.

Q. When the plan holder bought those shares that Kief bought, he got charged for a commission too, didn't he, a brokerage commission in addition to the nine?

A. Yes. That would appear on the price make-up sheet.

Mr. Shapiro: That is all.

By Mr. Irwin:

Q. Mr. Bonner, in connection with the Independence Trust Shares sold to the Pennsylvania Company that Independence Shares Corporation had purchased in the open market, what was the basis of the price at which those shares were sold to the Pennsylvania Company as Trustee for plan holders?

A. The closing price of the market; the market price at the close of the day for which the Trustee received moneys for investment.

Q. The previous day?

A. The previous day.

Q. And if-

Mr. Shapiro: Are you asking about the basic stock?
Mr. Irwin: I am asking about Independence Trust
Shares.

By Mr. Irwin:

Q. If those Independence Trust Shares purchased by Mr. Kief were purchased at 1.54 and the price as determined by the value of the underlying securities on the day previous [fol. 386] was 1.50, would you sell them to the Pennsylvania Company as Trustee at \$1.50 or \$1.54 plus 7½ per cent?

A. We would have to sell them at \$1.50.

Mr. Irwin: That is all.

By Mr. Shapiro:

Q. I don't understand. You mean you sold to the Pennsylvania Company—having paid today \$1.54, you would sell them to the Pennsylvania Company at the price paid yesterday?

A. At last night's closing price of the underlying securities. If that calculation brought a price of \$1.50, we would

be obliged to sell to the Trustee at a \$1.50.

Q. You fix the price yourself?

- A. No, sir; the market controls that.
- Q. I.mean Mr. Kief:
 - A. We did not.
- Q. When Mr. Kief paid \$1.54 you calculated on the basis of \$1.54?
 - A. No. sir.
- Q. If today he paid \$1.54—you send your calculation into the Pennsylvania Company when?
- A. If those shares were used today, the same day we purchased them we would have to sell them at \$1.50.
- Q. If today Mr. Kief, at ten o'clock this morning—when did you send your statement to the Pennsylvania Company?
 - A. About ten or eleven o'clock in the morning.
- Q. If the night before Mr. Kief paid \$1.54 for them and you sent the statement to the company, you figured at what, \$1.54 if it was the market price?
- A. No, sir; the price to the Trustee and investors is based entirely on its closing market price of the day before the investment was made.
- Q. How is that market ascertained, if there is no such price? It is an over the counter market.
- A. Mr. Kief must judge during the day as to what price he should pay or is willing to pay. He can afford to pay, [fol. 387] for instance, more than the general market price because there is a cost incident to the creation that he could save by picking up shares in the street.
 - Q. He fixed his own arbitrary price.

The Court: Is this very important?

Mr. Shapiro: Yes.

The Witness: Mr. Kief could fix an arbitrary price.

Discussion

The Court: Whose papers are these?

Mr. Shapiro: One of them is ours. I think you ought to ask for a copy of the trading account of both Mr. Kief and the company's trading account. I should like to make that request at this time to the Court that you be furnished with a copy of the trading account for the same period.

The Court: How much business does it involve? I don't see that it is material. If it is reflected in their profit or their securities transactions, that is the net result of the operation—

Mr. Geary: It is a very small operation. It wasn't profitable. Mr. Kief is no longer with us. We have abandoned it.

The Court: Take the year 1937, it is reflected in your \$121,000 statement of income.

Mr. Geary: Yes.

Mr. Shapiro: There is also a profit and loss in the markup of the securities from the time they bought them until they sold them which had nothing to do with Mr. Kief. My position is if this company that was trading in this stock was laying itself open, subjecting itself to depreciation in prices and fluctuations of the market, you ought to take the extent to which that was done into consideration.

Mr. Irwin: You have not done it any more?
[fol. 388] Mr. Geary: We haven't done it in quite a long time.

Mr. Shapiro: What does that mean?

Mr. Geary: About eight months,

The Court: You are no longer doing it?

Mr. Geary: No.

Mr. Shapiro: Mr. Kief was dismissed in the beginning of last year or the beginning of this year?

Mr. Geary: The trading activities were terminated before then.

Mr. Irwin: If your Honor please, before the argument on the motion, I would like to file with the Court exceptions to the order of the Court refusing our motion to dismiss, and exceptions to the order of the Court referring the matter to Mr. Hill as Master.

The Court: You may file them.

Mr. Irwin: I would also like to state for the purpose of the record that in view of the fact the Court has denied our motion to dismiss and in view of the fact counsel for the plaintiff has asked for a restraining order, I now withdraw the agreement that I have made on behalf of the Independence Shares Corporation that the moneys due the Independence Shares Corporation from the Pennsylvania Company approximating \$35,000 would not be paid until this matter was disposed of. This money represents compensation to the Independence Shares Corporation for creation of Independence Trust Shares for the planholders who elected to reinvest the cash payable to them arising from the sale of the seven underlying securities.

The Court: Mr. Irwin, what is the exact amount? It is around 35,000. Has there been any calculation? We speak roughly of it as \$35,000.

[fol. 389] Mr. Irwin: That is the only figure which I have,

which is approximately \$38,700.

The Court: Can't we get the exact amount? There must be some calculation between the Independence Shares Corporation and the Pennsylvania Company. It was about 7½ per cent. of approximately 550,000.

Mr. Saul: We can get that figure over the telephone, sir,

and it can be put on the record.

Mr. Rudenko: I should like to move, in accordance with Rule 15 of the New Supreme Court Rules of Practice, that the caption of the complaint be amended by adding thereto two other persons as parties plaintiff.

The Court: Any objection?

Mr. Irwin: I don't know what it is, if your Honor please.

The Court: We will consider it.

Mr. Irwin: For the purpose of keeping the record clear, I object to the addition of these additional plaintiffs in the absence of any jurisdiction, by reason of the fact that the original plaintiffs failed to have the required amount; I do not think that that defect can be cured by adding subsequent plaintiffs.

The Court: That goes to the merits of all of the plaintiffs' positions. This motion is merely in conformance with the Supreme Court Rule No. 15 to amend parties plaintiff. It

won't prejudice you in any way.

Mr. Irwin: I just want to have my objection on the record to the addition of any parties.

The Court: You object generally?

Mr. Irwin: Yes.

The Court: I will reserve decision on the matter.

Mr. Bohlen: Note a similar objection on behalf of the Pennsylvania Company. [fol. 390] Mr. Rudenko: Rule 15 of the New Supreme Court Rules says:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served ."

We are on a motion-

The Court: We have before us a motion for a preliminary injunction. That is the only thing before us. Proceed.

Mr. Rudenko: The opinion filed by the Court indicates very strongly that it would be desirable and necessary to preserve the status quo. The preservation of the status quo in this matter would rest on this basis, that the moneys in the hands of the Independence Trust Company and particularly in the hands of the Trustee be not disturbed, and all of the assets, whatever they are, and wherever they are that may be available hereafter to satisfy the claims/of any shareholders or any persons who by virtue of your Honor's opinion may be creditors, set up a cestui que trustent, be not dissipated pending such order. We, therefore, prepared what we think are appropriate injunctions which would prevent both the Trustee and Independence Trust Shares Corporation from disturbing or dissipating or diverting any of the assets of Independence Trust Shares or any of the trust funds in the hands of the Pennsylvania Company.

I think the motion speaks for itself, if your Honor please, so does the injunction. Particularly, we should like to have enjoined the Pennsylvania Company from distributing to the defendant Independence Shares Corporation the moneys in the hands of the Pennsylvania Company which are asserted by the defendant company to be due it, and which

I think belong to the shareholders.

The Court: You are referring to this approximately \$38,000, are you?

[fol. 391] Mr. Rudenko: Yes.

The Court: You also asked that the defendants be enjoined from operating, didn't you? Isn't that the effect of paragraph 2, paragraph B and paragraph C?

Mr. Rudenko: I think that is the effect of it, if your

Honor please.

The Court: You are asking first that the Pennsylvania Company be enjoined from paying over to the Independence Shares Corporation the 7½ per cent overwrite on approximately \$550,000 worth of securities, the \$550,000 which was involved, or, received from the sale of the seven of the forty-two underlying securities?

Mr. Rudenko: That is correct.

The Court: Then you are also asking that the Pennsylvania Company be restrained, or, be ordered and directed to segregate all payments made by plan holders after March 11?

Mr. Rudenko: Yes, sir.

The Court: That is your second application. Then you ask thirdly that the Independence Shares Corporation be

restrained from doing any business.

Mr. Rudenko: If your Honor's opinion will stand—I heard some talk of an appeal—it necessarily follows that the defendant will have to be liquidated. If it is going to be liquidated, only confusion can follow by the sale of such of the Independence Trust Shares—

The Court: I see Mr. Saul on his feet.

Mr. Saul: May I first give to your Honor the figure of \$38,258.85.

The Court \$38,258.85?

Mr. Saul: Yes. May I say a word in behalf of the Pennsylvania Company? This restraining order appears to be [fol. 392] directed primarily at the Pennsylvania Company. I would like certain facts put on the record. I think they will be admitted. I would like to make it perfectly clear first that the only interest of the Pennsylvania Company in this proceedings is that of a Trustee who desires to perform his duties as Trustee. I think the evidence before you shows that the Pennsylvania Company primarily, under the agreements, has three very important duties. I will confine my remarks to those three. The first is to deliver, under the terms of the Trust Agreement which is perfectly clear, to such of the plan holders or contract holders who desire to withdraw the underlying stock, or the trust holdings in accordance with the Trust Agreement, their share of the trust fund. That is their obligation. That obligation goes to the whole amount of the trust fund. I am using round There are approximately, at the present market price, three million and a half dollars worth of these underlying stocks that belong to some approximately 20,000 people in Philadelphia. Under the terms of this trust, the Pennsylvania Company, is bound, when the person for whom it holds this stock in trust requests delivery to make delivery.

If by any chance the trust company should be restrained—I confess I can't conceive on what ground the Trustee could be restrained from complying with the plain terms of the trust—but if any such restraining order were issued, and let us assume any considerable number of these persons under the terms of the deed of trust say, "Hand us back our stock," and the company were prevented from doing it by an order of court, and in the meantime some catastrophe

happened somewhere in the world and the prices go down, even if they went down 10 per cent. and if everybody asked for their stock back and couldn't get it and the price dropped 10 per cent. there would be a loss of \$350,000. I am not saying they all would, but it is the possibility I am talking about.

[fol. 393] The Court: If I may interrupt you, Mr. Saul, I do not understand that the application is to restrain the company from doing that.

Mr. Saul: Yes, it is.

The Court: I understand he is asking that the company be restrained from paying the Independence Shares Corporation the 7½ per cent. overwrite on the \$550,000, and secondly that the company be directed to segregate all payments made after March 11, 1939.

Mr. Saul: Perhaps my friend on the other side is not very precise in the use of language, but I will read you the motion that was served upon us:

"That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be restrained and enjoined from paying over, selling, assigning, crediting, delivering, transferring or otherwise disposing of, to the defendants or any of them, directly or indirectly, in any manner whatsoever, any property, assets, funds, moneys, deposits, credits, stocks, bonds, Independence Trust Shares, Independence Trust Shares Purchase Plans, Capital Savings Plan Contract Certificates, and any and all other contracts, documents, or other matter, in any way dealing with, connected with, or arising out of the said Capital Savings Plan Contract Certificates, the said Independence Trust Shares Purchase Plans, the said Independence Trust Shares, and the trust agreements, and any other agreements, between the defendants.

"That the defendants and each of them be restrained and enjoined from buying, selling, exchanging, transferring, assigning, liquidating, redeeming or otherwise dealing in or disposing of Capital Savings Plan Contract Certificates, Independence Trust Shares Purchase Plans, the Deposit Units of which Independence Trust Shares represent as undivided interest, Independence Trust Shares, and the [fol. 394] shares and stocks making up or constituting the said Deposit Units."

and so on and so forth.

The defendant is to be restrained from selling and enjoined and so forth, and I say to you, the way this order is drawn it simply means the Pennsylvania Company could do nothing to carry out the terms of the trust. That is one thing they do. I would just like to point to the three primary duties of the Trustee.

The Court: I wouldn't think of issuing such an order.

Mr. Saul: I have nothing further to say.

The Court: Which would prevent the Pennsylvania Company from preventing withdrawals of plan holders.

Mr. Rudenko: We didn't intend to include that.

The Court: The language is all-inclusive.

Mr. Rudenko: We followed as closely as possible-

The Court: I didn't mean to cut you short. Our minds meet on that.

Mr. Saul: The other two things I would like your Honor to keep in mind are first that daily there are people sending in money to the Trustee. It is the Trustee's duty to invest that money. If it is restrained from investing and the price goes up, they lose; on the other hand, if the price goes down the people who want to get out lose.

The third thing is there is an insurance policy in the face amount of \$5,000,000, insuring the lives of approximately 6700, almost 7000 plan holders, and the premium is payable

monthly.

The Court: And there must be a deduction made by the trust company for the payment of premiums?

Mr. Saul: Yes.

The Court: Otherwise there would be a lapse in the policy. [fol. 395] Mr. Saul: And that kind of policy can be no longer written, and if that policy lapses, they can never be compensated, they lose that. That affects approximately 7000 people, approximating \$5,000,000.

The Court: That would be an injury to the plan holder in

case there is a death?

Mr. Saul: Yes.

The Court: I would not make such an order.

Mr. Saul: Look at the order. Here you have seven plaintiffs who apparently have an interest of—possibly they have paid in some \$3000 or so. As a result of paying that in, they have the same proportionate part of interest in that stock as the other people have, but it is only a very small proportion. If they are not satisfied, if they don't want the Pennsylvania Company to act as Trustee, they have got a

perfect legal remedy. They don't need to go to law, all they have to do is exercise their right and take their property away from the Trustee and they are free from the Trustee forever.

The Court: As I understand it, there was never a contention made by the plaintiffs that there was on the part of the Pennsylvania Company any criticizable conduct. I tried to make that as clear as my language would permit, in my opinion, that there was nothing criticizable in the conduct of the Pennsylvania Company. There was no complaint made of the Pennsylvania Company.

Mr. Saul: We were in the position yesterday of having somebody come to us and say, "We want so many underlying shares we are entitled to." Fortunately, the one who represented them was yery reasonable. We pointed out to him we had this injunction. We told him we would go ahead and get it ready, but there was the possibility of something happening at this hearing.

What I mean to say is we have demands made on us daily to comply with the terms of our trust, and we want to do it. [fol. 396] That is all we want to do, do what we are sup-

posed to do under this deed.

Mr. Rudenko: If your Honor please, I should like to complete the statement I began to make before. The injunction was drafted in strict accordance with the language of your opinion, and in accordance with what we think is our duty to all plan holders under the language of your opinion. Persons who were heretofore shareholders, but who were paid out, who had their shares redeemed by the Persylvania Company, are entitled to recover from somebody the difference between the money they received and the money they paid in plus interest.

The Court: If there was fraud and misrepresentation, concealment as to material facts of which the plan holders were ignorant. It must be subject to that reservation. There may be persons in this case—I am not passing finally on it—there may be persons in this case to whom no misrepresentation was made, or concealment of facts. If so, unless there is liquidation of the company, they have no

complaint.

Mr. Rudenko: Yes, of course, but if there are persons who are entitled to be paid for the moneys they paid in, there is no special fund except the fund in the hands of the Pennsylvania Company.

The Court: Let us get one thing clear. I am not deciding before I have heard from Mr. Irwin, but you have several requests here that are far apart; they are premised on varying and sharply contradictory considerations. First of all, your request as to the \$38,000, that the Pennsylvania Company be restrained from paying to the Independence Shares Corporation. On that, we had an agreement, as I understood it. I said to Senator Shapiro I thought that that agreement would be honored by all of the parties concerned. Senator Shapiro thought in the protection of the interests. of his clients there ought to be some action by the Court, and there ought not to be a mere reliance upon the under-[fol. 397] taking by the Independence Trust Company and the Pennsylvania Company to make the application which, certainly on its own face is unrelated to the other applications which you have made. Another application which you made here, or series of applications, is broadly premised on one consideration, and that is that you think the company ought to be put out of business immediately.

Mr. Rudenko: That's right.

The Court: I won't make such a ruling. I am not going to make a ruling which will have the effect of putting this company out of business, because then I would be deciding this matter without awaiting the report of the special referee. If there is a solvency in this case of this company, it may be possible for all of the plan holders to realize and satisfy any claim which they may have, and I may make it impossible for them to realize these claims if I put this company out of business by issuing such a sweeping restraining order.

Mr. Rudenko: We don't press that injunction, we have simply presented it to you. We think it follows the language of your opinion. We think it is all due to the plan holders.

The Court: You have read something in the opinion which I have not put in it and which I did not intend to put in it.

Mr. Rudenko: The Pennsylvania Company at the present time is Trustee of a fund, either stocks or money or both. There are persons who are presently shareholders, who are coming in and who possibly are redeeming or liquidating their shares and are getting money from the Pennsylvania Company. Under the language of your Honor's opinion certainly all of that fund is accessible for the claims of all of

the shareholders. Isn't the payment to some of the shareholders a preference as against the balance of the shareholders? If eventually it is determined your opinion stands, [fol. 398] will not the Pennsylvania Company have granted a preference to those shareholders to whom it made payments?

The Court: You cannot get a 100 per cent result in this case. You have some 20,000 people paying in amounts varying from five, ten, to fifteen dollars per month. Most of them, I suppose, are five and ten dollar payments, under the terms of three separate trust agreements between the Independence Shares Corporation and the predecessor company with the Pennsylvania Company, and they are required to invest in the underlying shares or Independence Trust Shares. That is an obligation on the part of the Trust Company under the terms of the trust agreement. When I speak of the trust company, I mean the Pennsylvania Company. It is one thing to restrain a company from using money to carry out the purpose of a trust that it is another thing to restrain the Independence Shares Corporation from making any further sales to new plan holders. That is a different request.

Mr. Rudenko: That's right.

The Court: I will hear you on that phase of it. I take it that would be embraced in the sweeping language which you have used. I won't make any order which will prevent the Pennsylvania Company from receiving monthly payments which come in daily—many of them. I suppose you receive money every day?

Mr. Saul: Every day, yes, sir.

The Court: I won't make an order which will prevent the Pennsylvania Company from carrying out the terms of the trust.

Mr. Rudenko: As to that, we simply ask that the money be segregated.

The Court: They must invest the money under the terms of the trust, in Independence Shares Trust Certificates. [fol. 399] Mr. Rudenko: If that is so, how are we to differentiate between claims of shareholders who are presently paying money and possibly are only entitled to that money and no other money, and prior claims?

The Court: That would make a very small change in their position. A man who paid in \$300 over a period of thirty months at ten dollars a month, in the course of the next

month pending final determination of this whole matter, he may pay in another ten dollars; certainly there could not be paid in so much money as would make a tremendous change in the position of any one plan holder. Any sweeping order I might make along the lines you indicate undoubtedly would have a drastic effect on the individual plan holders. However, I would like to hear from Mr. Irwin who represents Independence Shares as to why there should not be an order restraining Independence Shares Corporation from making new sales; I mean from selling to new clients; also as to why an order should not be made restraining the Pennsylvania Company from paying over to the Independence Shares Corporation that \$38,258.

Mr. Irwin: As I understand it, if your Honor please, there is no other question that your Honor desires to hear me on, inasmuch as your Honor has ruled that insofar as our creating shares and supplying them to plan holders who have paid their money to the Pennsylvania Company, that that

will not be restrained.

The Court: With reference to the present plan holders.

Mr. Irwin: The present plan holders. If your Honor,
please—

The Court: In other words, there are two matters I would like to hear you on, one is an order restraining the payment of this \$38,000, and No. 2, is on the application for an order to restrain and enjoin the Independence Shares Corporation from selling new contracts or selling to new plan holders. [fol. 400] Mr. Irwin: I take it, sir, from the order which your Honor handed down and from the statement that your Honor has made in the record at the conclusion of the hearing on April 3d, that your Honor has not passed on the question of solvency or insolvency of this company, and that your Honor considers that as a necessary fact to be within your Honor's mind when you come to the final decision.

The Court: I wouldn't qualify that; not as a necessary fact, but something upon which I would like to be advised before finally passing on the application for appointment of a receiver.

Mr. Irwin: Well, a necessary fact to your Honor—I will put it this way, a fact your Honor considers essential to consider fully the entire case.

Let me point out to your Honor that as has been stated before, there are 20,000 plan holders here. There are some nine complainants. Not one of those nine complainants appeared at the hearing before your Honor and not one iota of testimony upon their behalf appeared from them as to the circumstances under which they were sold. In addition to that, there were some eight witnesses who at one time or another had bought plans. Of those eight witnesses, four had either received their money back in full and had no further interest in the matter whatever; this matter, as I understand it from your Honor's ruling, has not been finally determined. I, 'therefore, think that in the light of that, that no order should be made against the Independence Shares Corporation in this case. Unfortunately, but true, we have suffered untold harm as a result of the publicity which we received as a result of your Honor's order.

We are in the position where we are virtually helpless to do anything or say anything, and yet we see spread through the press, not only of Philadelphia, but throughout the State of Pennsylvania publicity which was most unfair

and harmful to this company.

[fol. 401] The Court: I won't consider any criticism of the opinion which I made. 'If I erred, you have your remedy.

Mr. Irwin: I know, sir, but it was in such language—
The Court: I won't hear any further discussion as to any
of the findings. They are no more and no less than what
was embodied in the consent decree to which your client,
Independence Shares, consented in June, 1938, when the
complaint was filled by the Securities and Exchange Commission.

Mr. Irwin: If your Honor please-

The Court: I won't—I think you are wasting our time. I won't hear anything further on the merits of my uling to date, and my ruling to date is simply this, I have dismissed your motion; I denied your motion to dismiss, filed by the two defendants in this case—the individual defendants. I also referred to the Special Master the question of a consideration of the solvency or insolvency of the Independence Shares Corporation. I will hear you only on this application which has been made today. I will hear anything that you have to say in answer to the request that is before me today.

Mr. Irwin: In the light of the fact that there is nothing pending at the present time, I don't see any reason why this company should be enjoined from the normal conduct of its business in any decree. If the sale of new plans is a part of our business, if that can be done, I don't see what harm can be done as far as these complainants here are concerned. I don't see what harm can be caused to any-

body who might have claims.

As your Honor has said, there may be, and I can say to your Honor, in fact there are thousands and thousands of people who have bought these plans without any complaint of taint or fraud or misrepresentation. I do believe, sir, that there is nothing in this record, or there is no cause which should motivate your Honor in feeling it essential for [fol. 402] the protection of any of the parties in interest, that the activities of this company be suspended.

The Court: I certainly think it is essential that the money not be paid over and be held by the Pennsylvania Company pending the final disposition of this matter. It is no more than what you agreed to do. I have not received notice of any application. I felt that any undertaking you would make as counsel, and Mr. Bohlen, would be kept by your

clients.

Mr. Irwin: It has been kept.

The Court: I thought it would be continued to be kept.

Mr. Irwin: It has been kept, and if your Honor feels that I have made any statement there that perhaps misled your Honor, I want to say to you that when I made that statement it was when this motion to dismiss was pending before your Honor, and when I felt that the matter would be disposed of promptly.

As a matter of fact, it was—and I am not saying this in any spirit of criticism of your Honor—but it was seven

weeks before that matter was finally disposed of.

The Court: There were several hearings held in the matter, there were some 500 pages of testimony and 180 or 190 exhibits. I think the matter was started on March 11th, the first hearing was held March 27th and the matter was finally concluded May 3d—it was not finally concluded, but my opinion was filed on May 18th.

Mr. Irwin : Yes.

The Court: Had you not withdrawn what may be described as a gentleman's agreement, I would not grant the preliminary injunction because there would be no necessity for it. You forced me to act in the matter by reason of the fact you withdrew that agreement. I would have gone on the assumption that any undertaking made by you as coun-

sel, would be kept and there would be no necessity on the [fol. 403] part of this Court to issue a restraining order. In view of the fact you have withdrawn the agreement, you have compelled a decision on this matter by action of the Court.

Mr. Irwin: If your Honor please, I made that agreement after—

The Court: I am not criticizing you. You advise your client as you think you ought to advise them, but I do say that had you not withdrawn the agreement at the inception of this hearing, in view of the action taken by Senator Shapiro's office——

Mr. Irwin: I withdrew it because here we were faced with a series of motions and order contained therein which would

have virtually put us out of business.

The Court: In my opinion it would have been totally useless and unnecessary for me to issue an order where counsel, reputable counsel, had agreed to do the very thing which the order seeks; there would have been no necessity on my part to do that.

Mr. Irwin: We have not deviated from that agreement

one iota, if your Honor please.

The Court: Do you withdraw it or don't you withdraw it? Mr. Irwin: If your Honor please, in view of what your Honor has said, I would like to consult with my client if your Honor would indulge me for a moment or two so that I can discuss the matter with him.

The Court: All right, I will permit you to do so. We will

take a five-minute recess.

(Recess from 4 o'clock P. M., to 4:10 o'clock P. M.)

[fol. 404] After Recess

Mr. Irwin: If your Honor please, after considering everything in this matter and after discussing it with my clients, I must stand on my statement made at the inception of the hearing that any agreement that we have made in regard to this thirty-eight thousand and some odd hundred dollars is withdrawn. The motion has been interposed, in the meantime we have been without the funds for quite some eight weeks, and under all the circumstances we do not feel—my clients do not feel and I do not feel we should agree not to receive that which we are justly entitled to.

If your Honor does make an order, I would request your Honor request a bond in sufficient amount to cover possible loss.

The Court: Of course, under Rule 65, Section C, Lenust fix such an amount as I deem proper.

Mr. Irwin: It is discretionary with you.

The Court: What is your thought? I would like an expression of opinion on your part. We are speaking of a bond as to the \$38,000?

Mr. Irwin: Wes.

The Court: What is your thought in the matter?

Mr. Irwin: I think the bond should be at least \$2000 so that in the event of an appeal and action by the Appellate Court, that the bond would protect us as to the cost of

that appeal.

The Court: Well, I don't see why \$1000 would not be enough. There is only \$38,000 involved. If the company had the money invested at 2 per cent, which is all you can get in a bank—you wouldn't get that in a savings account, you would not get more than 2 per cent on it. That is \$760 per year. This matter certainly will not last more than one [fol. 405] month or two before its final determination, so I think \$1000 would be ample because the loss of interest would be in the neighborhood of fifty or one hundred dollars.

Mr. Irwin': I think, your Honor, what you say there is right, but I think the bond should be adequate to cover the cost of any appeal in this matter.

The Court: I think \$1000 would be adequate. I will hear

you on that.

Mr. Rudenko: I agree with your Honor on \$1000. May I say one further thing—

'The Court: Have you concluded, Mr. Irwin's

Mr. Irwin: Yes.

The Court: Go ahead. Do I understand under the rules that I must fix a bond where I issue a restraining order?

Mr. Rudenko: That's right. It is in your Honor's discretion. Since we are dealing with possibilities, there is this possibility that tomorrow the Independence Shares Corporation may determine to liquidate some more of the underlying securities. Now, of course, it may be perfectly true that tomorrow it may be advisable to liquidate the securities. At the same time, from the viewpoint of the plan holders who are cestui que trustent, it may not be ad-

visable. I say that some order should be made forbidding liquidation of securities without the Court's consent, or without a hearing.

The Court: Is it in contemplation that any securities will

be liquidated?

Mr. Irwin: The securities are all in the hands of the Pennsylvania Company. If someone comes in—

The Court: I am not referring to that, I think Mr. Rudenko is referring to the sale of underlying securities. [fol. 406] Mr. Rudenko: Yes; sale or elimination of further securities.

The Court: All right.

Mr. Irwin: I can assure your Honor that there is no such contemplation.

The Court: In the event such action is contemplated, will

you consult the Court?

Mr. Irwin: I would consult the Court before any such action along that line was undertaken. I think it is due the Court, and I will assure you that will be done.

. The Court: That will be enough for me.

Mr. Rudenko: I should like to hear from Mr. Saul and Mr. Bohlen.

The Court: That isn't necessary because in my opinion I said the decision to diminate securities rests entirely with Independence Shares Corporation and the Pennsylvania Company is utterly and absolutely without any con-

trol or authority in the matter.

Mr. Rudenko: I will withdraw my suggestion. If your Honor please, so that there will be no misunderstanding, I understand Mr. Irwin to say on behalf of his clients that no shares will be eliminated from the portfolio hereafter unless you are advised in advance of such intended or proposed action?

The Court: So that you may have an opportunity at that

time to ask for an order.

Mr. Irwin: While the matter is pending before your

Honor, you have my assurance on that.

The Court: That is sufficient for me. As far as the applications before me are concerned, the first one is an application for an order enjoining the Pennsylvania Company from paying \$38,000 to the Independence Trust Corporation and [fol. 407] the other is a request for an order enjoining the Independence Shares Corporation from selling new contracts. As to the first, if you will prepare an order so that

it will be satisfactory in form, I will issue the order enjoining the Pennsylvania Company from paying over to the Independence Shares Corporation and Independence Shares Corporation from receiving this \$38,253.85, which is the 7½ per cent overwrite or load as was described on the elimination of the \$550,000 worth of securities which has been reinvested, bond to be fixed in the sum of \$1000.

Mr. Irwin: If your Honor please, in that connection, of that \$38,500 approximately 34,000 represents what would be the reinvestment of the cash principal at that time. There was income from those underlying shares which was received at the same time of approximately \$4500. That

The Court: Which income was distributed or dispersed among shareholders?

Mr. Irwin: Where the income was paid to the Pennsylvania Company and reinvested.

The Court: I am afraid I don't follow you.

Mr. Irwin: Well, I will try to make myself clear on it.

The Court: All right.

Mr. Irwir: At that time there was due and payable this sum of \$38,500, \$34,000 of that was from the reinvestment that was due to us as a commission from—

The Court: That constituted the 7½ per cent overwrite? Mr. Irwin: The \$34,000 would be 7½ per cent on the principal sales, or proportion of the sales that were due to the plan holders. That was reinvested. The \$4500 represents income from all the underlying securities that was paid to the Pennsylvania Company and which would be one of our normal sources of income.

[fol. 408] The Court: Was that the 21/2 per cent?

Mr. Irwin: No, it is not the $2\frac{1}{2}$ per cent, that would be at the same rate, $7\frac{1}{2}$ per cent, but it represents, say \$60,000 bf income that was paid to the Pennsylvania Company which in turn was reinvested by us.

The Court: Was that 7½ per cent on that too? Mr. Irwin: Yes, that is what the plan calls for.

The Court: I will put that in my order.

Mr. Irwin: I wanted you to know that, due to the fact that that would not all represent the proceeds of the sale of the eliminated securities.

The Court: That is 7½ per cent of the reinvestment of the proceeds from the sale of the eliminated securities and 7½ per cent of the reinvestment of the cash dividends.

Mr. Irwin: At that time.

Mr. Rudenko: I understood what your Honor was interested in was preventing the payment of any income from any source from the Pennsylvania Company to Independence Shares Corporation. I don't think they are entitled to any income at all irrespective of the manner of creation.

The Court: Then I misunderstood you. I thought your application only went to the sale or elimination of the \$550,000 worth of securities. Do you mean any further

income?

Mr. Rudenko: Any income whatever in the hands of the Pennsylvania Company which Independence Shares Corporation says it is entitled to. I think pending the proceedings—of course, we will put up a bond for it—the Independence Shares Corporation should not get any money from the Pennsylvania Company to which plan holders may be later entitled.

The Court: How could they operate their business? Wouldn't that be another way of issuing an order restrain-

ing them from any further operation?

[fol. 409] Mr. Rudenko: I don't know that that would necessarily follow. I assume they have other sources of income.

The Court: With a company that has \$84,000 of capital, of which \$37,000 is good will, and net assets of 47,000, if my recollection serves me—you gentlemen will correct me if I am wrong—there is about \$37,000 in cash. They have their expenses of operation and maintenance, and if I would issue such an order that would preyent them from doing business.

Mr. Rudenko: It may be, but it is perfectly possible that during that time the Pennsylvania Company in the creation of new shares will be taking income from those shares to pay it to the Independence Shares Corporation when that income, under the facts developed before your Honor was never in the contemplation of the plan holders intended to be paid.

The Court: That was the only deduction—I am not making a statement now, I am asking a question—the only deduction now being made and turned over to the Pennsylvania Company would be on account of that \$60, wouldn't it, plus the normal overwrite to each investor of 9 per cent?

Mr. Irwin: 71/2 per cent.

The Court: Yes, 7½ per cent.

Mr. Rudenko: Every time a payment is made to the Pennsylvania Company some of that money in some fashion goes to Independence Shares Corporation.

The Court: How much is that likely to amount to in the

next month?

Mr. Bohlen: About \$3750. That is exclusive of any \$60 fees: but there isn't very much of that at the present time.

Mr. Rudenko: If that is so, we have the situation of all the plan holders who knew of only the \$60 charge, are being [fol. 410] charged income which is being taken from their shares and paid to Independence Shares while the proceedings are pending.

The Court: Well, I think we are getting down to splitting hairs. I don't see where it will make such a difference in their position where they have three and a half million dollars, which is the approximate value of the holdings of these plan holders; I don't think \$3750 would make such a difference. The \$38,000 amount is a sizeable amount. I think we are getting down to refinements. I hesitate to issue an order which will deprive them of any income and perhaps make it impossible to operate. Someone must be paying the Independence Trust Shares currently, otherwise the Pennsylvania Company and not fulfill its obligation of investing the money. You get back to the starting point, you are getting back to the point where you restrain the company from doing business.

Mr. Rudenko: I don't think so far as-

The Court: I am not going to do that. Would that prevent the company from doing business if you did not get this \$3750?

· Mr. Irwin: Yes, if they are prevented from getting any

money, we would be simply put out of business.

The Court: I am talking about turning over the 7½ per cent overwrite on the \$50,000. Would that \$3750 have that effect?

Mr. Irwin: If it continues long enough. We have current

bills to pay.

The Court: I don't think it will be much more than a month before this matter is finally disposed of—or two months.

Mr. Irwin: If your Honor is contemplating any sum of that kind, I think the bond ought to be at least ten or fifteen thousand dollars, if we are going to be put in that

position, because we are, in effect, your Honor has stated—

[fol. 411] The Court: Would it have any effect of seriously crippling the conduct of their business, or would it just be a question of the 2 per cent they would get on the

money if they get it?

Mr. Irwin: It would be a question, as your Honor put it at the time; we had seven thousand dollars in cash. We have certain obligations, we have to keep our payroll, we have to keep people there, we have to pay rent, and those things have to be paid in cash. We depend, to a certain extent, on that cash for our current income. I certainly think, in effect, your Honor has stated what Mr. Rudenko is asking your Honor to do will interfere with our business or cripple us.

The Court: I am not sufficiently familiar with the operations of the business other than in a general way. Where you have a corporation with \$47,000 worth of assets, the loss of, or the temporary postponement of an income of \$3750 per month or \$7500 for two months might cripple one

business and it might not affect another business.

Mr. Irwin: If this matter was disposed of in a month, that is true, but this might not be disposed of for six or eight months. I think if Mr. Rudenko wants to have an order of that kind made—and your Honor has indicated your Honor thought it was unnecessary—I think we ought to have a bond of fifteen thousand dollars.

The Court: Your costs of appeal would be the same, it wouldn't cost you any more money to print the paper books;

it would be only five or ten pages more.

Mr. Irwin: If this matter is held up at all, if it is held up and not finally disposed of for six months and we were deprived of our cash income for six months or even a year, which is not without the realm of possibility in matters of this kind, it would certainly seriously interfere with us if

we were deprived of that income.

The Court: I won't make any order as to the \$60 because there is no question that that was told to every plan holder. [fol. 412] They all understood as to the \$60. As to the 7½ per cent, according to the testimony that was not the case. I don't think it makes much difference in the consideration of the whole case as to whether that order is made or not with respect to the \$3750 or \$7500 for two months, spread among three and a half million dollars. That won't make

much difference. I wouldn't make such an order unless you put up a bond as to that part of it in the sum of \$5000. I will make that order on the condition that a bond in the sum of \$5000 is put up. That will be two bonds because I will make two separate orders. I will make an order as to the \$38,000 which has been discussed, upon the putting up of a \$1000 bond, and I will make an order as to the $7\frac{1}{2}$ per cent, which was to have been turned over by the Pennsylvania Company, for a period of sixty days, at which time application may be made to remove the order, upon the filing of a bond in the sum of \$5000. Unless the bond is filed the order won't be issued.

Mr. Irwin: In that connection, if we find that this matter is extended over a period of one month and possibly for six months. I don't think—

The Court: I made it for sixty days.

Mr. Irwin: In which event we would be enabled to come in—

The Court: It would expire at the end of sixty days.

Mr. Irwin: If the bond of \$5000 is not put up.

The Court: You will frame a decree?

Mr. Rudenko: Yes.

Mr. Irwin: As I understand your Honor on that point-

The Court: I have enjoined you for the next sixty days—I have enjoined the Pennsylvania Company from paying over to you and I have enjoined you from receiving the 7½ [fol. 413] per cent overwrite on payments currently made to the Pennsylvania Company from the date the order is made: from the date the decree is signed.

Mr. Irwin: That will require a bond of \$5000.

The Court: I am making two separate orders. If you agree that the money shall be held by the company, not paid over to you, I won't issue an order. I am trying to save you the embarrassment of having an order made by the Court against your client with respect to these funds. I would rather do it that way. In my opinion it would probably be more advisable in your client's own interest to do it that way. You are counsel for Independence Shares Corporation and it is your duty to advise them as you see fit.

Mr. Irwin: I do want to point out to your Honor that when your source of income, your cash out of which you ordinarily pay your operating expenses is cut off, as it would be by your Honor's order, it might cause irreparable

damage.

The Court: It couldn't be irreparable.

Mr. Irwin: It could if we could not pay our rent. We have certain rent obligations, and under the terms of our lease they could claim the entire rent due for the balance of the term.

The Court. I think \$5000 would be substantial.

Mr. Irwin: I think if your Honor is going to make any order of that kind, I see no necessity for it, and as your Honor has pointed out to Mr. Rudenko, I certainly think we

ought to have a bond that will protect us.

The Court: I will take your attitude in consideration to that extent; I will make that order for thirty days; \$5000 for thirty days. That will be ample security, in my opinion, it will indemnify you for any loss you may suffer in the event the decision goes against the complaints on that [fol. 414] score. It is more than 100 per cent of the amount you will receive.

Mr. Rwin: It is for thirty days. As I understand it, if I will renew my agreement, or if I make a statement to the Court as to the 38,000, your Honor will make no order of

any kind?

The Court: I will make no order if there is a statement by counsel—and that includes counsel for the Pennsylvania Company—with respect to the \$38,000, and with respect to this matter, if there is any statement undertaken by the parties. You should do it by stipulation. In that event, I will make no order.

Mr. Irwin: May V again ask your Honor's indulgence until I talk to my client?

The Court: Certainly.

Mr. Irwin: As I understand it, then, consulting my clients, you will make an order restraining the payment of the thirty-eight thousand and some odd hundred dollars with a bond of \$1000 and that you will make an order as to the payment of the 7½ per cent for thirty days with a bond of \$5000?

The Court: That is correct.

Mr. Irwin: I do not believe that that amount is adequate, but the matter is entirely within your Honor's discretion, of course. I can't agree to any of that, and I assume that before the orders are signed that counsel will submit them for examination?

The Court: Yes.

Mr. Rudenko: Naturally.

Mr. Irwin: And consultation with you?

The Court: Yes.

Mr. Irwin: I do feel in this case that this is another thing that just makes it that much more difficult for us—[fol. 415] The Court: I think \$5000, as I said before, is more than 100 per cent of the amount which was likely to have been received; it would probably have been in the neighborhood of \$3750, that being 7½ per cent of \$50,000. By fixing a bond of \$5000 is more than adequate, in my opinion. The \$1000 on the \$38,000 will be in addition.

Mr. Irwin: That restraining order will automatically be eliminated at the end of thirty days unless the matter is

renewed before your Honor?

The Court: As to the 7½ per cent, it is for only thirty days; as to the other, it is a restraining order without limit.

Mr. Irwin: We understand that.

The Court: With respect to the other application, I won't grant the application for the various other requests you have made; I will refuse those because you have in some of those paragraphs other requests—I am not going to split them up now; I won't split up all the other requests you have made other than to make these two orders. I will grant you an exception as to that.

Mr. Rudenko: One further thing. I handed your Honor, a moment ago, a letter which was sent by Independence Shares to its plan holders. This is not such a matter of any moment, but I mention it to the Court because I am an officer of the Court. I don't think it is a very wise letter to send out. As an officer of the Court, I would like your

Honor to see some of the language in that letter.

The Court: Well, I have read it. There is only one serious criticism I have to make of it, and that is that it has my middle initial incorrect.

Mr. Barba: That is my fault, your Honor.

The Court: I think they felt it was the thing to do. It is up to them. There is nothing criticizable in it. It may be questionable from the standpoint as to whether it is the proper thing to do, to try your case out of Court, but it is [fol. 416] nothing to be upset about; at least, I am not upset about it. I would like to consider it as another expression of free speech on the part of the parties. Even the parties to a litigation have a right to express themselves.

Mr. Rudenko: I am happy your Honor accepts it with

more equanimity than I did. I was considerably upset.

The Court: As you get older you get more tolerant. I see nothing to criticize about it. I will make no further comment about it. I don't approve of it, I don't stamp it with my approval. I want you gentlemen to know that. You have no authorization from me to send it out. I don't want you to construe any statements I have made as any authorization by the Court to send out such a letter, although I won't express any criticism of sending it out other than what I have already said. Is there anything else?

Mr. Rudenko: No.

The Court: I will be here today. You may submit the applications and the decrees after consulting with the Pennsylvania Company and the Independence Trust Shares, both Mr. Bohlen and Mr. Irwin.

Mr. Irwin: That will be done promptly tomorrow morning?

Mr. Rudenko: I can't confine myself to any time.

Mr. Irwin: I think it should be done promptly, or to-morrow.

Mr. Rudenko: I will consult with counsel, Harry Shapiro, before I draft the order.

The Court: When will he return?

Mr. Rudenko: He won't return until the end of the week. I will call him on the phone and consult with him.

Mr. Irwin: I think the matter should be done promptly.

The Court: You would want to consult your associate in a similar situation.

[fol. 417] Mr. Irwin: If he is going to confer with his associate—

The Court: You are in no position of complaining on that score because the 7½ per cent will go to you until the order is signed. You should scarcely complain of any delay along that line.

Mr. Irwin: I will say very frankly insofar as the 38,000 might still go to us, but in the light of what you. Honor has stated from the bench, I would not consent to the elimination of the order and filing of the bond—

The Court: It is hardly important enough-

Mr. Irwin: Upon that angle, I can assure your Honor

The Court: I am trying to preserve the status quo in this case as far as possible. I would rather do it by agreement of counsel. I have unhesitatingly denied these applications where I thought in the event the matter is disposed of not in accordance with the petition and requests of the plaintiffs in this case but there might be unpreventable injury done to your clients; I have refused these applications. Where I thought it was necessary for the protection of the investors and plan holders without causing irreparable injury or causing great injury to your client the Independence Shares Corporation, I have made the orders.

Mr. Irwin: I want your Honor to know that when your Honor indicated you were going to do certain things from the bench, I would respect that as the order of the Court.

The Court: I would much rather have taken your word

on these things.

Mr. Irwin: I want your Honor to know that.

The Court: You will do that, Mr. Rudenko, as soon as Senator Shapiro gets back?

Mr. Rudenko: Yes.

[fol. 418] Independence Share Cornation, Balance Sheet as at February 28, 1939

Assets

Cash on Hand and in Banks	\$4,118.96	
Cash—Depositors Redemption Fund	2,500.00	
Cash in Bank—Trustee for Distribu-	2,000.00	
tors and Salesmen	601.10	
Survey of the su	681.13	
Investments	1	\$7,300.09
1000 Independence Trust Shares at		
Cost	0.000 50	
Less Reserve for Deprecia-	6,060.59	
tion to 8/21/20	0.000.00	
tion to 8/31/38	3,600.59	
5 Paoli Bank & Tours Co.	1	2,460.00
5 Paoli Bank & Trust Co. at \$14.00		1
per share	70.00	
49.754 Independence Trust Shares		
at 2.24115 Escrow Account #2	111.50	
140.903 Independence Trust Shares	•	
at 2.24115 Escrow Account #3	329.34	
23.078 Independence Trust Shares		
at 2.24115 Escrow Account Inde-		
pendence Trust Shares Purchase		2
Plans	73.23	
Q.	13.23	

	* 1	
Securities held for sale		
4611 Independence Trust Shares at		
2.24115 (of which 150 shares		
were in Box)		10 222 04
	•	10,333.94
Accounts Receivable	4	
Pennsylvania Company 336 shares		
account of Independence Trust	007.40	
Shares Purchase Plans	885.46	
[fol. 419] Pennsylvania Company		
1756 Shares account of Capital		*
Savings Plan Contracts	4,888.72	Ø.
Pennsylvania Company 200 shares	. ,	
account of National Plan	530.43	egg •
	•	6,304.61
Others		2,630.49
Stock Transfer Stamps on hand	5.00	
Documentary Stamps on Hand	19.46	
Postage on Hand	401.71	
		426.17
Dividends Receivable	1 10	239:25
Prepaid & Deferred Charges		200.20
Deferred Stationery, Printing &	and the second	1
Supplies	3,446.91	
Deferred Insurance	121.73	
	* 121.75	1
Deferred Traveling & Entertain-	05.00	
ment	25.00	
Prepaid Salaries	485.00	
Deferred Membership Fees, etc.	25.00	
D		4,103.64
Furn-ture & Fixtures	13,627.89	2
Less Reserve for Depreciation	4,244.61	*
	•	. 9,383.28
Advances to Distributors & Salesmen	36,311.92	
Less Reserve for Unsecured Ac-		
counts	33,471.70	
_		2,840.22
Good Will (through Merger with		
Capital Savings Plan, Inc.)		37,759.14

		404 004 00
	. 93	\$84,364.90
	**	

[fol. 420] · Liabilities	· .	
Accounts Payable		***
N. 1	\$ 681.13	•
United States Corporation Com-	Ф 001.13	
pany	885.92	
Birnbaum-Jackson Company	622.41	
Jr. R. McFetridge & Son	949.50	* * * * * * * * * * * * * * * * * * * *
_	- 40.00	\$3,138.96
Underlying Securities Purchased for		.,-,
creation of 5,000 Independence	1	
Trust Shares	10,902.18	
Dividend Accumulations on creation		
of above Shares	. 17.25	
1753 Independence Trust Shares due	-	10,919.43
from miscellaneous brokers		
Dividends Payable to Pennsylvania		4,006.19
Company, Trustee and/or Custo-	:/'	
dian		916.80
Accrued Items		910.90
Accrued for Auditing	1,060.00	.,
Accrued for Federal Old Age Bene-	_,,	
fit Taxes (Employees)	56.70	
Accrued for Federal Old Age Bene-	** -3P	
fit Taxes (Employees Contribu-		
tions)	56.88	
Accrued for Federal Old Age Bene-		
fit Taxes (Salesmen) Accrued for Unemployment Taxes	50.67	
(Salesmen)	150.00	
Accrued for Unemployment Taxes	152.02	
(Employees)	176.66	3
Accrued for Salaries Payable	237.42	
	201.92	1.790.35
[fol. 421] Reserves		1,4 30.30
For Federal and State Capital		
Stock Taxes	121.88	
Price adjustment on Independence		
Trust Shares	43.68	1
		170.56

Commissions Payable National Plan, Inc. Service Commissions		121.41 226.30	347.71
Capital Stock	•		
1506 Shares authorized 1038 Shares outstanding	g with a		
stated value of \$65 per	share	68,770.00	
Operating Losses September 1938 November 1938 December 1938 January 1939	1,475.23 * 2,000.03 *		
(Merged Companies) February 1939	1,446.63		
(Merged Companies)	597.72 *		
	6,610.92 *		
Less Profit October 1938	915.82	5,695.10	• 63,074.90
			\$84,364.90

[fol. 422] IN UNITED STATES DISTRICT COURT

OPINION

Sur Application for the Appointment of a Receiver, Sur Motions to Dismiss Bill of Complaint

Filed May 18, 1939

KALODNER, J.:

The complainants are owners and holders of certain contract certificates purchased from Capital Savings Plan, Inc., since merged with and now Independence Shares Corporation, a Pennsylvania corporation.

The principal defendant is the Independence Shares Corporation, a trust and investment corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia. The individual de-

[.] Red in the original.

fendants are officers and directors of the Independence

Shares Corporation.

The Pennsylvania Company for Insurances on Lives and Granting Annuities is a banking corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business in Philadelphia. The Pennsylvania Company, &c. is trustee under several agreements between the trustee and the Independence Shares Corporation and certain of its predecessor companies.

The complainants seek the appointment of a receiver for the Independence Shares Corporation, with full power and authority to take into possession all the property and assets of the Independence Shares Corporation, and the trust assets held by The Pennsylvania Company, &c., under its agreements with the Independence Shares Corporation. They also seek determination of liabilities, liquidation and distribution and dissolution of Independence Shares Cor-

poration.

The complainants ground their action on alleged misrepresentations and fraudulent statements made to them [fol. 423] at the time they purchased Capital Savings Plancontract certificates from the predecessor of the Independent Shares Corporation. They aver that they and other plan holders have been, and are being, defrauded by the Independence Shares Corporation.

The complainant also avers that the Independence Shares

Corporation is insolvent.

The jurisdiction of this court is invoked under its general equitable and receivership powers, and under Section 22 (a) of the Act of Congress of May 27, 1933, entitled the "Securities Act of 1933," as amended and supplemented, (Act of May 27, 1933, c. 38, Title 1, Section 22 (a), 48 Stat. 86 (a), U. S. C. Title 15, Section 77V (a)).

As previously stated, the principal offices of the Independence Shares Corporation, and of The Pennsylvania Company, &c., are within the Eastern District of Pennsylvania. All the individual defendants are residents of the

Eastern District of Pennsylvania.

Eight of the nine complainants are residents of the Eastern District of Pennsylvania. The ninth complainant, Abe Zubrow, is a resident of the State of New Jersey. All the complainants individually own \$2000 contract certifi-

cates, on which sums ranging from \$80 to \$500 have been paid in installments.

Prior to December 31, 1938, the Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. The officers and directors of the two corporations were substantially the same. On December 31, 1938, there was a merger of Capital Savings Plan, Inc., and Independence Shares Corporation, under which the latter acquired all of the liabilities, assets functions, and business of Capital Savings Plan, Inc., which was an investment and trust corporation, organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. Capital Savings Plan, Inc., was originally incorporated in Pennsylvania on October 15, 1931.

[fol. 424] Independence Trust Shares registered with the Securities and Exchange Commission prior to the merger of the two companies on May 2, 1938, under the Securities Act of 1933. The registration was with respect to Independence Trust Shares Purchase Plans, providing for maximum aggregate payments of \$6,720,000, with a maximum of 5600 Monthly Payment Plans, and \$480,000 under a maximum of 960 Full Paid Plans.

From January, 1932 to April, 1938, and under three different trust agreements, the defendant Capital Savings Plan, Inc., issued and sold to members of the public residing in the Eastern District of Pennsylvania and elsewhere, securities, namely Capital Savings Plan Contract Certificates, which are participations in an investment trust or scheme commonly known as an "Installment Investment Plan," for which The Pennsylvania Company, &c. is trustee and defendant Capital Savings Plan, Inc. was sponsor and distributor.

These certificates are monthly payment plans issued and sold in unit denominations of \$1200 providing for the payment of \$10 per month on a periodic or installment basis over a period of ten years. They could be purchased in one-half unit of \$600 or any multiple thereof. They could be secured with life insurance protection providing that upon the death of the purchaser the insurance company would pay to the trustee in one lump sum the installment payments remaining unpaid, which sum ranges downward on a \$1200 unit certificate, from \$1190 to \$10.

The trustee upon receipt of each periodic or installment payment deducted and still deducts the various fees and charges. The fees include a service fee of \$60 on a \$10 per month unit certificate, deducted from the equivalent of the first nine monthly payments; a trustee fee of 25 cents per \$10 payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee deducted in decreasing amounts from each monthly payment.

[fol. 425] The remaining balance after fees and charges are deducted was and is used by the trustee at the direction of the defendant Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc., to acquire from defendant Independence Shares Corporation, Independence Trust Shares for the account of each purchaser. These shares are interests in an installment investment trust for which The Pennsylvania Company, &c. is trustee and of which defendant Independence Shares Corporation is is-

suer, sponsor and depositor.

Each Independence Trust Share represents a 1/1000th interest in a deposit unit previously created by defendant Independence Shares Corporation with funds borrowed or supplied by it. The deposit unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper proportion of a distribution account. The price at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of Capital Savings Plan Contract Certificates was not and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty-two common stocks which make up the deposit unit, as of the day before the Trustee makes the purchase, to which was and is added odd-lot brokerage, commissions and taxes. To the total of this was and is added an arbitrary charge or load of 9 per cent. (now reduced to 71/2 per cent) and any distributable accumulations which may then be applicable to the deposit unit. This 9 per cent arbitrary charge or load was divided, 11/2 per cent to defendant Independence Shares Corporation and 71/2 per cent to the defendant Capital Savings Plan, Inc., and was a source of income to the defendant Capital Savings Plan, Inc., through the ten-year term in addition to the \$60 service charge which is deducted from the first nine payments or their equivalent. Independence Trust Shares were and are subject to an additional charge of 2½ per cent of currently distributable income and currently distributable principal, [fol. 426] which charge is deducted semi-annually and paid to the trustee.

The Installment Investment Plan of Capital Savings Plan. Inc. was in effect a trust upon a trust, with two sets of trustees' fees, and with two sets of sponsors' fees, expenses, charges and other costs of operation deducted from the moneys paid in by the purchasers and from the earnings derived from the underlying common stocks in the portfolio of Independence Trust Shares. The Independence Trust Shares purchased by the trustee are held in a common port-·folio, but the account of each purchaser is credited with the shares or fractional shares to which he is entitled. At any time the purchaser may receive the Independence Trust Shares which are credited to his account or the liquidating value thereof in cash. The liquidating value of each share was and is computed at the bid price maintained by defendant Independence Shares Corporation and was and is based upon the market bid price of the forty-two common stocks underlying the shares plus the applicable portion of the distributable accumulations and less odd-lot brokerage. commissions and taxes. This price is customarily approximately 10 per cent less than the then offering price of the

Defendant Independence Shares Corporation maintains offices in Philadelphia and Pittsburgh, Pennsylvania, and has general agencies in other cities and subdivisions of Pennsylvania. Defendant Independence Shares Corporation is represented, and its certificates were offered and sold in defined territories, by junior salesmen, senior salesmen and general agents. Their sole remuneration is dependent upon commissions, and overriding commissions, based upon the amount of certificates sold, the initial commission being payable only after delivery of the certificates and being contingent thereafter upon receipt by the trustee of subsequent installment payments. Many of the salesmen were parttime representatives, such as office workers, public employees, factory workers, school teachers and insurance salesmen.

[fol. 427] The offer and sale of Capital Savings Plan Contract Certificates was discontinued on April 9, 1938. However, the holders of approximately 95 per cent of all the outstanding Capital Savings Plan Contract Certificates are

continuing and will continue to send in their periodic cash installments to the trustee, for the purchase of Independence Trust Shares, and the trustee uses and will continue to use the aggregate of these periodic cash installments to purchase Independence Trust Shares from defendant Independence Shares Corporation for the accounts of said holders.

On May 2, 1938 defendant Independence Shares Corporation filed with the Securities and Exchange Commission a registration statement covering a new issue of Independence Trust Shares to be used as the underlying medium of investment for all Capital Savings Plan Contract Certificates outstanding, and as the underlying medium of investment for a new issue of certificates called Independence. Trust Shares Purchase Plans. A registration statement covering these latter certificates was filed by Independence Shares Corporation on May 19, 1938.

The Independence Trust Shares Purchase Plans are participations in an investment trust or scheme commonly known as an "Installment Investment Plan," for which The Pennsylvania Company, &c. is custodian and defendant Independence Shares Corporation is sponsor. They are substantially similar to the Capital Savings Plan Contract Certificates issued and sold by Capital Savings Plan, Inc., during the period December, 1932 through April 9, 1938. By contract dated May 14, 1938 defendant Capital Savings Plan, Inc., was underwriter for and had the exclusive right until January 1, 1939 to offer, sell and distribute Independence Trust Shares Purchase Plans.

After January 1, 1939, Independence Shares Corporation itself sponsored, issued and sold Independence Trust Shares Purchase Plans, taking over and using substantially the same sales persons, selling organization and selling practices of Capital Savings Plan, Inc. Defendant Independ-[fol. 428] ence Shares Corporation absorbed the assets, liabilities and functions of Capital Savings Plan, Inc. and Capital Savings Plan, Inc. was dissolved.

The following is an excerpt from the Prospectus (June 8, 1938; also January 3, 1939) issued by the Independence Shares Corporation:

"The Independence Trust Shares Purchase Plan is a systematic program by means of which an individual may purchase Independence Trust Shares and thus acquire an in-

terest in a well-diversified list of representative American

corporations.

"Independence Trust Shares are shares of an investment trust of the fixed type issued under an Agreement and Declaration of Trust dated as of April 2, 1930 entered into between the Sponsor of these Plans and The Pennsylvania Company for Insurances on Lives and Granting Annuities. as Trustee, which Agreement and Declaration of Trust is entirely separate from the Independence Trust Shares Purchase Plans. The Independence Trust Shares are created in units of 1000 shares by depositing with the Trustee one share of the common stocks of each of 42 corporations and eash accumulation to the proper proportion of a distribution account. Each Independence Trust Share, therefore, represents 1/1000th interest in one share of each of the 42 corporations and a proportionate interest in the distribution account. The 42 corporations include banks, railroads. oil companies, utilities, industial companies and insurance companies, a complete list of which will be found in the Prospectus relating to Independence Trust Shares which is attached to this Prospectus. These corporations were chosen for their comparative stability of earning power and for their future possibilities."

The above excerpt, it will be noted, describes the Independence Trust Shares as "an investment trust of the fixed type." The "fixed type" of trust has a fixed list of securi-[fol. 429] ties which the management cannot change. This description of the "fixed type" in the Prospectus is at variance with the description of the nature of the trust shares given by the President of the Independence Shares Corporation, and by counsel for The Pennsylvania Company, &c., in the preliminary hearing of this complaint. The President of Independence Shares Corporation, Alfred H. Geary (pages 120-121, notes of testimony), described the trust shares as "an investment trust of the semi-fixed type." The "semi-fixed type" trust is one with a fixed list of securities, with the management allowed to eliminate those securities which in their judgment are insecure, but not to add others; they must stay within the fixed list for all their investments.

Francis H. Bohlen, Jr., Esquire, counsel for The Pennsylvania Company, &c. (page 56, notes of testimony) described the trust shares as a "limited" management type, and as a "fixed trust subject only to limitations."

It may be appropriate to say at this point that there are some 20,000 plan holders who have paid in approximately \$4,000,000.

As above stated, the Independence Shares Corporation registered with the Securities and Exchange Commission in 1938. Subsequent to the registration, on June 22, 1938, the Securities and Exchange Commission filed a complaint against the Capital Savings Plan, Inc., and the Independence Shares Corporation, alleging that:

"for at least three years last past the defendant, Capital Savings Plan, Inc., has engaged, and is few engaging, and the Independence Shares Corporation is about to engage, in acts and practices which constitute violations of Section 17 (a) of the Securities Act of 1933."

The complaint asked that the two defendants named, and:

"their officers, agents, employees, and sales personnel be enjoined and restrained from be obtaining money or [fol. 430] property by means of untrue statements of material facts or omissions to state facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and particularly concerning:

- "(a) Any comparison of the operation of the plan to the operation of a savings bank account or other type of deposit account.
- "(b) The extent to which and the time or times at which a purchaser may liquidate his securities or otherwise obtain the return of moneys paid in.
- "(c) The worth or liquidating value of the security at the end of 10 years or after a total of 120 payments have been completed or at any other time subsequent to the purchase thereof.
- ""(d) The relation of The Pennsylvania Company for Insurances on Lives and Granting Annuities or any other trustee to the defendants or to the operation of the plan, or the responsibility of such company or any other trustee under the plan.
- "(e) Any guarantees or assurances of profit or against loss inherent in or attached to the security or any opportunities afforded thereunder.

- "(f) The life insurance feature of the plan.
- "(g) The nature and the character of the operation of the plan as a medium of investment or method for the installment or periodic purchase of trust shares or the manner in which moneys paid in thereon by purchasers thereof are invested in common stocks or the amount and percentage of all charges, fees, commissions and costs which are deducted from said moneys prior to such investment or from the income or return of principal of such investment
- [fol. 431] "or any other untrue statements of material facts or omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they are made not misleading, similar to those specifically set forth above or of similar purport or object."

After answer filed, making general denial, the Capital Savings Plan, Inc., and Independence Shares Corporation joined with the Securities and Exchange Commission in a consent decree June 23, 1938, restraining the two corporations from engaging in the practices complained of by the Commission.

In essence, the instant proceeding is based on the same grounds as was set forth in the 1938 Securities and Exchange Commission complaint. The testimony adduced at five of six hearings held in the instant case overwhelmingly substantiates the allegations in the two proceedings.

Before discussing this testimony and evidence, it is necessary to dispose of a motion to dismiss filed by the Independence Share's Corporation, and the individual defendants, and a motion to dismiss filed by The Pennsylvania Company, &c.

I shall consider the two motions in the order named.

Independence Shares Corporation and the individual defendants moved to dismiss upon the grounds;

- (a) That the amount in controversy is less than \$3,000;
- (b) That there was not the requisite diversity of citizenship; and
- (c) That there is no jurisdiction in equity or for the appointment of a receiver because the complainants were unsecured simple contract creditors who had not reduced

their claims to judgment and failed to realize upon execution process.

All these contentions are without merit.

Paragraph 1 of the bill of complaint contains jurisdictional averments stating that relief is sought under, inter [fol. 432] alia, Section 22 (a) of the Securities Act of 1933, as amended and supplemented, being the Act of May 27, 1933, Chapter 38, Title 1, Section 22 (a); 48 Stat. 86 (a), U. S. C. Title 15, Section 77V (a). The section referred to reads as follows:

"(a) The district courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law broughts to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

It becomes necessary in this connection to consider Chapter 38, Title 1, Section 12 of the Act (15 U. S. C. A. 77L) which reads:

- "Any person who-
- "(1) sells a security in violation of section 77e, or
- "(2) sells a security (whether or not exempted by the provisions of section 77c, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means f a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not [fol. 433] knowing of such untruth or omission), and who

shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

And finally, Chapter 38, Title 1, Section 16, of the Act (15 U. S. C. A. Section 77p):

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

It is evident that the allegations of the bill, which are assumed to be true for the purposes of the discussion of the motions to dismiss, bring the complaint within the provisions of the law quoted. For, according to those allegations, these defendants sold securities by means of a prospectus or oral communication, both of which included untrue statements of material facts or omitted to state material facts necessary to make the statements not misleading: wherefore under Section 12 they are liable to the purchaser for the amount of the consideration paid, with interest.

. It is not necessary to look beyond this particular statute for jurisdiction in this court upon the allegations in the bill. Section 16, already quoted, provides specifically that the rights and remedies provided by the subchapter (Chapter 38, Title 1) "shall be in addition to any and all other rights and remedies that may exist at law or in equity." It becomes a matter of no moment, therefore, whether or not diversity of citizenship exists, and whether or not the amount in controversy exceeds \$3000 exclusive of interest [fol. 434] and costs, and it is unnecessary to pass upon those questions: see Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738; Sterdle v. Reading Company (C. C. A. 3), 24 F. (2d) 299, 301; Slaymaker Lock Co. v. Reese (D. C. E. D. Pa.) 24 F. Supp. 69, 73: where suits arising under the laws of the United States were entertained by Federal courts despite the lack of diversity of citizenship.

We pass now to the other question raised by the motion to dismiss: that complainants are not entitled to come into equity because they are unsecured simple contract creditors who have neither obtained judgments nor issued executions thereupon.

The fallacy in this contention lies in the assumption that the complainants are unsecured simple contract creditors.

They are not.

This is a class bill. The class is composed of the various persons who have subscribed to the investment plans of Independence Shares Corporation, and of Capital Savings Plan, Inc., now merged with the former. The Pennsylvania Company, &c. holds legal title to a vast amount of securities for the benefit of the subscribers. Specific, substantial rights in this property—the securities—are given to the purchasers. The following is culled from the Prospectus (January 3, 1939):

"Rights of Purchasers

"Applicable to All Plans:

- "(1) Remittance of Distributions: A Purchaser may from time to time instruct the Custodian to remit the distributions upon his Trust Shares and may subsequently direct that future distributions be applied to the purchase of Trust Shares.
- "(2) Partial Withdrawal: A Purchaser may at any time withdraw part of his Trust Shares or direct the Custodian in writing to sell part of his Trust Shares and remit the net [fol. 435] proceeds. Subsequently and at any time prior to complete withdrawal, such Purchaser has the right to redeliver to the Custodian the Shares withdrawn to be held for his account.
- "(3) Complete Withdrawal: A Purchaser may at any time terminate his Plan by surrendering the same to the Custodian with written instructions either to deliver his Trust Shares to him or upon his order or to sell his Trust Shares and remit the net proceeds to him or upon his order. If the Purchaser directs the delivery of his Trust Shares, sufficient Trust Shares and fractions thereof will be sold to pay all authorized deductions and leave no fractional Trust Shares, and the net balance will be paid in cash.
- "(4) Continuation of Custodianship: After a Purchaser has completed his payments he may permit the Custodian

to retain custody of his Trust Shares, either applying distributions to the purchase of additional Trust Shares or remitting the same.

"(5) Transfers: A Purchaser may (a) transfer his right, title and interest in and to his Trust Shares to another person, acceptable to the Sponsor and the Custodian, who has made application for the delivery of a similar Purchase Plan; (b) transfer his right, title and interest in and to his Trust Shares to another person who may only exercise the right of complete withdrawal; or (c) execute and file with the Custodian a declaration of trust, declaring that he holds his right, title and interest in and to his Trust Shares for the benefit of another person or persons."

It is clear, therefore, that regardless of the fact that The Pennsylvania Company, &c. is denominated in the Pros[fol. 436] pectus "a custodian": and regardless of the nature of the written agreement between The Pennsylvania Company, &c. and the Independence Shares Corporation (by virtue of which The Pennsylvania Company, &c. holds the title to the securities): nevertheless, The Pennsylvania Company, &c. holds the securities, not for itself, but as a trust: the trust is for the benefit of the subscribers or purchasers whose money bought those securities; and the subscribers or purchasers (the complainants as a class) are in consequence the cestuis que trustent.

While it is true that as a general rule unsecured simple contract creditors who have not obtained judgments upon their claims have not the status to appeal to equity for relief, that situation does not exist here and the rule is not applicable. The complainants are beneficiaries of a trust. Regarded as such they have, in instituting proceedings in equity, appealed to the proper forum for redress of the alleged wrongs: see Case v. New Orleans, 101 U. S. 689,

25 L. Ed: 1004:

"It is, no doubt, generally true that a creditor's bill, to subject his debtor's interests in property to the payment of the debt, must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned nulla bona. The reason is, that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary; or, in other words, that the creditor is remediless at law.

"But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted. or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. cordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, 'Bona, sed impossibilia non cogit lex.' It has been [fol. 437] decided that where it appears by the bill that. the debtor is insolvent and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. Turner v. Adams, 46 Mo., 95; Postlewait v. Howes, 3 Iowa, 365; Bk. v. Harvey, 16 Iowa, 141; Botsford v. Beers, 11 Conn., 369; Payne v. Sheldon, 63 Barb., 169. This is certainly true where the creditor has a lien or a trust in his favor.

"But, without pursuing this subject further, it may be said that whenever, a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Tappan v. Evans, 11 N. H, 311; Holt v. Bancroft, 30 Ala., 193."

To the same effect is Wyman v. Wallace, supra, where jurisdiction was taken of a creditor's bill in equity without judgments having first been obtained by the creditors. A fuller discussion of the law is afforded in the opinion of the Circuit Court in the same case, reported in 135 F. 286, at page 292 et seq., accompanied by a citation of authorities.

The Circuit Court said (page 292):

"A suit for the enforcement of a lien or for the enforcement and administration of a trust is one peculiarly of equitable cognizance, and may be maintained by a contract creditor whose demand has not been reduced to judgment. Day v. Washburn, 24 How. 352, 16 L. Ed. 712; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Townsend v. Vanderwerker, 160 U. S. 171, 178, 16 Sup. Ct. 258, 40 L. Ed. 383; Clews v. Jamieson, 482 U. S. 461, 478, 21 Sup. Ct. 845, 45 L. Ed. 1183. In Oelrichs v. Spain, 82 U. S. 211, 21 L. Ed. 43, the court said that whenever an element of trust existed jurisdiction in equity was always conferred. In these respects the case at bar differs from those cited by the appellfol. 438] lants. Jones v. Green, 68 U. S. 330, 17 L. Ed. 553; Smith v. R. Co., 99 U. S. 398, 25 L. Ed. 437; Scott v. Neely.

140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Nat. Tube Works Co. v. Ballou, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; Hollins v. Brierfield Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113."

It is to be noted that in the above excerpt the Circuit Court specifically distinguished Hollins v. Brierfield Co., relied upon by the defendants herein.

The same conclusions are reached in Merchants' National Bank et al. v. Chattanooga Construction Company, 53 F.

314, 317, where t was said:

"It seems to me that this bill does not fall within any case in which it has been held that a judgment at law, or return of execution nulla bona, or both, is necessary to maintain the bill. It is not an effort to reach equitable assets merely.

In the case of Stutz v. Handley, 41 Fed. Rep. 537, the court says of that suit; 'Its object being to reach and subject a trust fund, complainants were not even required to have reduced their claims to judgment, and exhausted their remedy at law, after the insolvency of the company; citing Case v. Beauregard, 101 U. S. 688-690."

The defendants cannot, therefore, prevail in their contention that the complainants have not the right to seek

relief in a court of equity.

As for the prayer that a receiver be appointed: "The appointment of a receiver is merely an ancillary incidental remedy": Gordon v. Washington, 295 U. S. 30, 79 L. Ed. 1282; Pusey & Jones v. Hansen, 261 U. S. 491, 497; Burton v. Carey, 82 F. (2d) 657.

In Cooke v. Flagg (C. C. A. 2) 233 F. 426, the court, after stating that a trust existed because the defendant, having obtained money through fraudulent misrepresentations, had become a trustee ex maleficio, justified the ap-[fol. 439] pointment of a receiver by the court below on the ground that it was imperative to safeguard the corpus of the trust.

Passing now to the similar motion to dismiss on behalf of The Pennsylvania Co. &c., it is sufficient to say that this case differs entirely from that of Gordon v. Washington, 295 U. S. 30. There, the Secretary of Banking had taken over a bank, and the Supreme Court held specifically that "The Secretary has the status of an equity receiver re-

sponsible to the court" in which he had filed a certificate of possession. True, there is no charge here that The Pennsylvania Company, &c. has been guilty of any misconduct, neglect or mismanagement and no testimony thereof. The Pennsylvania Company, &c., however, has not the status of an equity receiver responsible to any court. And, if the funds in its hands are to be preserved or distributed for creditors in the instant proceeding, that must be done by an arm of the court—a receiver appointed by the court and responsible to it.

A receiver will be appointed by the court to take possession of the subject matter of the trust or a part thereof, and to administer the trust in respect thereto, if this is necessary for the protection of the interests of the beneficiaries. This is one of the equitable remedies available to the beneficiary or beneficiaries of a trust: See Restatement of the Law on Trusts, Section 199, Chapter 7.

For the reasons stated, the defendants' separate motions to dismiss are refused.

As to the merits:

As previously stated, the testimony overwhelmingly substantiated the allegations in the bill of complaint that there were untrue statements made to purchasers in the sale of contract certificates, and that there was concealment of fact, of which untruths and concealments the purchasers were unaware.

Taken as a whole, the testimony and exhibits offered in evidence disclosed, in summary:

- (1) That the Independence Shares Corporation, and its predecessor, the Capital Savings Plan, Inc., furnished sales-[fol. 440' men with written instructions as to methods and material to be used by them in selling the contract certificates.
- (2) That said written instructions contained and suggested the use of untrue statements of material facts and the omissions of vitally important relevant facts.
- (3) That officers of the Independence Shares Corporation, and its predecessor, gave verbal instructions to sales men which contained and suggested the use of untrue statements of material facts and the omissions of vitally important relevant facts.

- (4) That the Independence Shares Corporation, and its predecessor, employed salesmen from every walk of life without necessary and proper qualifications, and solely because of the fact that they were in a position to sell fellow employees, relatives, friends, neighbors, and persons with whom they enjoyed business relations.
- . (5) That purchasers were told that the plan was a "savings" plan; that the plan was comparable to a savings bank account but paying a higher rate of interest.
- (6) That purchasers were told The Pennsylvania Company, &c. was the "backer" of the contract certificates.
- (7) That purchasers were told that The Pennsylvania Company, &c. "guaranteed" \$2000 for every \$1200 paid in over a ten-year period at the end of ten years.
- (8) That purchasers were told \$60 was the sole "service charge," when, in fact, \$60 was the initial service charge, and there were other charges including a nine per cent overwriting collected by the Independence Shares Corporation, and its predecessor, on all chares placed in the investment portfolio of the plan purchaser (the nine per cent overwriting now reduced to seven and one-half per cent).
- (9) That purchasers were told The Pennsylvania Company, &c. was in sole and complete control of the "investment" of funds paid in by the contract plan purchasers.
- [fol. 441] (10) That there was misstarement and concealment of material facts relating to the life insurance features of the plan.
- (11) That purchasers were told that money paid in could be withdrawn in full at any time, or after definite periods variously represented to be one, two, or three years.
- (12) That purchasers were told the trustee's agreement (the agreement between the Independence Shares Corporation and its predecessor, and The Pennsylvania Company, &c.) "guaranteed" \$2000 for every \$1200 paid in in ten years.
- (13) That there was a concealment of charges made by the Independence Shares Corporation and its predecessor.
- (14) That the Independence Shares Corporation maintained its own trading department to "make" a market for

Independence Trust Shares, which were re-sold at a seven

and one-half per cent mark-up to plan holders.

First as to the exhibits referred to. They included bulletins prepared by the Burton Bigelow Sales Coaching Clinic, at the request of the Capital Savings Pian, Inc. They contain instructions and suggestions to salesmen employed by Capital Savings Plan, Inc. These bulletins were of the familiar "high-pressure" sales type.

Just a few examples:

"Bulletin No. 7-Every Earner is a Prospect! Don't Be Afraid to Cold Canvass.

"Bulletin No. 8-Making The Successful CSP Approach.

"Bulletin No. 9—Avoiding the 'Premature Exit' or 'Ease-Out' Before You Have Told Your Story.

"Bulletin No. 10-Separating the 'Suspects' from the

Prospects.

"Bulletin No. 11—Emptying the Prospect's Bucket of Present Satisfaction.

[fol. 442] "Bulletin No. 12—Using the Re-Hook Question.

"Bulletin No. 13—Re-Filling the Prospect's Bucket With Desire Points.

"Bulletin No. 14-Picturizing Future Life Money Needs."

"Bulletin No. 16—Eight Ways for Handling CSP Resistances.

"Bulletin No. 17—'The Words in Your Mouth—'Exactly What to Say When Handling the Most Frequently Met CSP Resisters."

"Bulletin No. 18—'The Words in Your Mouth—#2' Exactly What to Say When Handling the Most Frequently Met CSP Resisters."

The titles of these bulletins are eloquent evidence of the sales methods used by the defendant, Independence Shares Corporation, and its predecessor.

Plan holder after plan holder testified that the sales methods outlined in these bulletins were used on them to

make sales.

Miss Agnes Landon, a plan holder, testified (page 192, notes of testimony):

"A. He (the salesman) told me the Pennsylvania Company were trustees for this plan, that it positively could not go wrong because the Pennsylvania Company were backing them up in every way, shape and form."

The same witness also testified (page 190, notes of testimony):

"A. I can't tell you everything he told me, because he talked very nearly an hour, but he did make it very clear to me that the Pennsylvania Company were the trustees for this affair. I was very much impressed by it being the Pennsylvania Company because at that time I had a trust fund there, which I still have, and that was the inducement [fol. 443] of my taking these shares, because of the Pennsylvania Company " " He told me at the end of ten years after depositing \$1200 with the Capital Savings Fund that I was to get \$2000."

Again (page 192, notes of testimony):

"A. Oh, yes, I asked him if it was something similar to a building and loan. He said they were better than a building and loan because a building and loan sometimes doesn't run out for eleven or twelve years, but this positively would be paid back to me in ten years."

By the Court:

"Q. What do you mean?"

"A. The \$2000 was to be paid to me in ten years."

Anthony Picone, a shoemaker, incidentally, who bought two plans, testified (page 199, notes of testimony):

- "A. Yes, he told me the Pennsylvania Company was in back of it."
- "Q. Did you know who they were, the Pennsylvania Company?"
- "A. Well, I heard about it, it was a bank of great reputa-

Mrs. Grace Picone, whose husband was a plan holder, testified (page 202, notes of testimony):

"A. He (the salesman) said the Pennsylvania Company was in back of it

Miss Jean Fitch, a plan holder, testified that a co-employee in a local department store was also a salesman for the defendant, Independence Shares Corporation, and stated further (page 219, notes of testimony):

"A. The salesman told me that the Pennsylvania Company was in charge of the money and they were backing the money up."

Miss Laura Burdette, a saleswoman for the Capital Savings Plan, Inc., testified (page 228, notes of testimony) that she was employed:

[fol. 444] "A. To go out and sell it to other people, anybody that wanted to buy it."

Miss Burdette stated that she was coached by a Mrs. Jane T. Balanos, a general agent of Capital Savings Plan, Inc. Her testimony (page 231, notes of testimony) is illuminating:

"Q. What did she (Mrs. Balanos) tell you about the plan, and what to tell the customers?"

"A. She told me to go out and tell the customers that this Capital Savings Plan was a very good investment, it was better than a bank, it was better than a building and loan, it was better than anything on the earth, and it had forty-two of the best companies in the country that were backing it up. The Pennsylvania Company was supposed—was one of the companies, one of the banks that was backing it up, very, very much. I was supposed to emphasize that above everything else."

By the Court:

"Q. You say 'supposed to emphasize;' were you told to emphasize it?"

"A. I was."

"Q. That the Pennsylvania Company was one of the backers?"

"A. Yes. * * *,"

Miss Burdette also testified that Frank C. McCown, vicepresident of the defendant, Independence Shares Corporation, and its predecessor, was present at the conversation with Mrs. Balanos, when she received sales instructions (page 233, notes of testimony).

In connection with this incident, Miss Burdette testified that McCown told her not to say that the plan would run out in ten years, but that (page 234, notes of testimony):

[fol. 445] "A. Mr. McCown said, 'You don't sell it that way. Tell the people in seven and a half years they are going to get \$2000.'"

By the Court:

"Q. In seven and a half years on a \$10 payment per month?"

"A. That's right, but that was supposed to mature in seven and a half years."

"Q. Did you have any literature in connection with

this?"

"A. When I went to sell the people?"

"Q. Yes, with this seven and a half year proposition."

"A. Yes, I did."

"Q. I show you Exhibit C-3."

"A. That is correct."

Incidentally, Miss Burdette, at the time she was employed as a saleswoman, was but 18 years old. She testified that among others whom she sold was a produce peddler.

Another witness, Cosme Balanos, testified (page 275, notes of testimony) that he was employed as a salesman by Capital Savings Plan, Inc.; that the company supplied him with a "sales kit", on the first page of which was a photograph of the doors of The Pennsylvania Company, &c.; that on the inside was a financial statement of The Pennsylvania Company, &c.; that next appeared a letter from a vice-president of The Pennsylvania Company, &c.

The following excerpts from the sales bulletins supplied by the defendant, Independence Shares Corporation, and its predecessor, to salesmen disclose that the misstatements and the concealment of facts which the complainants allege

abounded in these bulletins.

For example:

Bulletin No. 13, "Re-Filling The Prospect's Bucket With Desire Points," referring to the payments made by the plan holders, states (page 4):

[fol. 446] "This is legally safeguarded by an old, reliable trustee and by them proportionately invested in trust shares",

Bulletin No. 16, "Eight Ways for Handling CSP Resistances," states (page 2):

"The Trustee guarantees that if you carry your contract to maturity, you will never pay in more than \$1200, and that you will never receive less than \$2000 as its matured value."

Bulletin No. 17, "The Words in Your Mouth—' Exactly What to Say When Handling the Most Frequently Met CSP Resisters," states (page 8):

"The trust agreement with the Trustee, The Pennsylvania Company guarantees that if you carry your contract to completion and get all its benefits, you cannot possibly invest more than \$1200 for each \$2000 maturity.

"The Trustee's agreement likewise guarantees you that you will never get less than \$2000 upon the maturity of

your Plan."

Bulletin No. 18, "The Words in Your Mouth—#2' Exactly What to Say When Handling the Most Frequently Met CSP Resisters," states (page 10); *

"The Trustee also collects your dividends, reinvests them for you and carries out the provisions of your savings

program.

"Yet, when you pay the sales person who sold you, the trustee, the operators of CSP—everybody—it costs you only \$60 for each \$2000 maturity."

Bulletin No. 19, "Making the Successful Close," states (page 4):

"There is nothing new about the CSP principle—except the fact that the small man is allowed to get in on it. The [fol. 447] Trustee Bank is 125 years old, the average age of the forty-two corporations is 55 years, and the Plan itself is the fastest-growing Savings Plan in the country.

"No need to take my word for anything about this Plan. The forty-two corporations are well known and their assets and earnings are published regularly. The Trustee is a 125-year old bank with assets of a quarter of a billion dollars. You can look these things up for yourself any time."

The various Prospectuses also contained misstatements of fact.

For example:

The Prospectus of November 1, 1933 (Exhibit C-1) states on page 5, under the caption "Your Trustee," the following:

"The Pennsylvania Company for Insurances on Lives and Granting Annuities, founded in 1812, is one of the

oldest banks in the United States. Its Trust Department is one of the largest in the country.

"The collecting, investing and protecting of your money is entrusted not to Capital Savings Plan, Inc., but to your

Trustee.

"If Capital Savings Plan, Inc., and the Trustee went out of existence, your property would be unaffected, for legally it is yours, definitely put aside in trust for you. These funds cannot be removed from the safekeeping of the Trustee except by your order, as long as your payments are maintained:"

See also the Prospectus (Exhibit C-3) from which the witness Cosme Balanos testified he made sales in 1934. This Prospectus, also under the caption "Your Trustee," states:

"The investing of your money is entrusted not to Capital Savings Plan, Inc., but to your Trustee, The Pennsylvania [fol. 448] Company for Insurances on Lives and Granting Annuities, Philadelphia."

From the same Prospectus:

"Your ownership is the common stocks of these companies is made possible through the purchase by the Trustee of Independence Trust Shares, also trusteed and operated by the same Trustee."

From the same Prospectus, under the caption "Your Own Trust Fund":

"The \$10 a month which you set aside (you may save more if you care to) is invested and looked after by one of the country's oldest and most trusted financial institutions, which, as Trustee, receives your money, invests it, and receives and reinvests all your profits for you."

This Prospectus also states, under the caption "The Service Fee":

"The total service fee to Capital Savings Plan, Inc. is \$60 for each \$2000 maturity value contract (\$10 per month) applied for. This is payable out of deductions made during the first year's payments. The Trustee charges \$3 per year—25 cents per month—for each year the contract is in force, up to and including the first ten years."

The application for contract certificates of the Capital Savings Plan, Inc. (Exhibit C-9) also states that \$60 is the maximum service fee, with the only other charge being 25 cents monthly to the trustee.

The Prospectuses time and again aim to sell the "fact" that the plan holder, by subscribing, is entering upon a "savings" program. The very designation "Capital Sav-

ings Plan" speaks for itself.

The book given to subscribers, so that entries might be made of their payments, is in the pattern of a bank deposit

book (Exhibit 13).

[fol. 449] The testimony of these witnesses, and the bulletins and prospectuses quoted from, give the entire complexion of the methods of salesmanship, the "guarantees" given to plan purchasers, the positive misrepresentations, and the failure to disclose material facts. For example, the statements in Bulletin No. 2 that "These funds cannot be removed from the safekeeping of the trustee except upon your order," and "This is legally safeguarded by an old, reliable trustee and by them proportionately invested in trust shares "" are absolute misrepresentations.

In this connection the record discloses:

- (1) That The Pennsylvania Company, &c. was a trustee with limited powers (page 57, notes of testimony).
- (2) That management of the Trust Shares and the stock which comprised the Trust Shares is solely in the Independence Shares Corporation, and not in the control of The Pennsylvania Company, &c.
- (3) That the Independence Shares Corporation in its discretion can sell any of the underlying forty-two securities and reinvest the proceeds in shares of the remaining underlying companies.
- (4) That The Pennsylvania Company, &c. does not select the investments.
- (5) That The Pennsylvania Company, &c., does not "guarantee" the safety of the investments, the maturity of the plans, or that the plan holders will receive \$2000 in 10 years or at any other time—in fact, the only duty of The Pennsylvania Company, &c. is the safekeeping or custody of the Trust Shares.

(6) That the statement made in Bulletin No. 18, and by salesmen, "When you pay the sales person who sold you, the trustee, the operators of CSP-everybody-it costs you only \$60 for each \$2000 maturity," is untrue. In addition [fol. 450] to the \$60 charge, there was a nine per cent (now reduced to seven and one-half per cent) "overwriting" or "load" charge made by defendant, Independence Shares Corporation, and its predecessor, on the Trust Shares which went into the plan holder's partfolio. In other words, the subscribing plan holder paid his \$60 service charge, and each dollar he paid in was subjected to the nine per cent (now seven and one-half per cent) overwriting profit made by the sponsor company, Independence Shares Corporation, and its predecessor. In addition, when, as it recently happened, seven of the forty-two underlying securities were sold and the proceeds reinvested in some of the thirty-five remaining underlying securities, there was an additional charge of seven and one-half per cent made with respect to that reinvestment. Also, Independence Trust Shares were subject to an additional charge of two and one-half per cent of currently distributable income and currently distributable principal.

There is also undisputed evidence to the effect that there was misrepresentation as to the cost of life insurance, which was featured as an adjunct of the plan. This misrepresentation, and in some instances concealment, had two aspects:

- (1) That plan holders were led to believe that the insurance premium was paid by Independence Shares Corporation.
- (2) That, upon the death of the insured, the full \$2000 maturity would be paid over to the plan holder beneficiary—when, as a matter of fact, the insurance was for the unpaid balance of installments due by the insured plan holder.

Reference was made to the recent sale of seven of the forty-two securities constituting the portfolio of Independ-[fol. 451] ence Trust Shares. The testimony disclosed that in February, 1939, upon advice of its investment counsel and upon the adoption of appropriate resolutions by the board of directors, the Independence Shares Corporation

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sold seven of the securities in its portfolio. The proceeds of the sale totaled \$662,335.76.

The "values" of these seven securities at the dates they were deposited with the trustee, as determined by Indepen-

dence Shares Corporation, was \$763,655.33.

The \$763,655.33 was the cost of the securities to the Independence Shares Corporation. The cost to the plan holders was approximately \$820,000.00, since there was a seven and one-half per cent "overwriting" or "load" which the Independence Shares Corporation charged the plan holders (see page 582, notes of testimony).

Consequently, as a result of the sale of these seven securities for \$662,335.76, there was a loss to the plan holders of

\$158,000.00.

There was still a further loss to the plan holders in this transaction. Independence Shares Corporation, in reinvesting approximately \$550,000.00 of the \$662,000.00 received in the sale (the balance was disbursed in cash to plan holders), charged an "overwriting" or "load" of seven and one-half per cent against this \$550,000.00, or approximately \$40,000.00 (see page 321, notes of testimony).

The net result of the "overwriting" at the time of the original investment; the loss in the sale of the securities, and the second seven and one-half per cent "overwriting" charge, was a loss to the plan holders of close to \$200,000.00—or approximately twenty-five per cent of the amount they

paid in.

In discussing this transaction, no criticism is intended of the sale of these seven securities since there was no evidence that there was an abuse of discretion on the part of investment counsel or of the Independence Shares Corporation. With respect to The Pennsylvania Company, &c., [fol. 452] under the terms of the trust agreement with the Independence Shares Corporation, it had no say or part in the sale of the seven securities.

The transaction is cited for two reasons:

- (1) As evidencing the fact that the Independence Shares Corporation had, and exercised, sole control of the cecurities in the trust, and that The Pennsylvania Company, &c. had no control or authority whatsoever over the securities;
- (2) That there were overwriting charges made against, and losses suffered by, the plan holders by the exercise of

control and authority lodged in the Independence Shares Corporation, which was not only concealed from the plan holders, but which was deliberately misrepresented to the plan holders (See Bulletin No. 18, page 10: "It costs you only \$60 for each \$2000 maturity": Bulletin No. 2: "These funds cannot be removed from the safekeeping of the trustee except upon your order"; in the same Bulletin: "This is legally safeguarded by an old, reliable trustee and by them proportionately invested in trust shares.").

This loss of approximately \$200,000 has another important significance.

According to its latest available financial statement, the Independence Shares Corporation as of February 28, 1939, had total assets of \$84,364. Of the latter amount, \$37,759 was carried as "good will." Deducting the \$37,759 "good will" item, the actual assets of Independence Shares Corporation are approximately \$47,000.

As against the approximately \$47,000 of assets, there existed a contingent liability as of August 31, 1938 of \$3,486,000 with respect to 1,104,869 Independence Trust Shares sold by the Independence Shares Corporation or its predecessor during the period from September 1, 1935 to June 14, 1938. This \$3,486,000 represents actual receipts [fol. 453] by the Independence Shares Corporation or its predecessor from the sale of such Shares.

Final determination that plan holders are entitled to the amount which they have paid in, plus interest, by reason of the fact that there was fraud in the sales made to them, raises the question as to whether it will be possible for the Independence Shares Corporation to satisfy awards made to the plan holders.

As has been stated, there has already been a \$200,000 loss to the plan holders.

The complaint asserts that the Independence Shares Corporation is insolvent. At the very outset of these proceedings the attorneys were advised that in the event the motions to dismiss were denied, and that in the further event that this court was of the opinion that the prayer for the appointment of a receiver should receive further consideration, then the question of solvency or insolvency of the Independence Shares Corporation would be referred to a special master for his investigation and report.

The motions to dismiss having been denied, and the court being of the opinion that there should be further consideration of the prayer for the appointment of a receiver, this matter will be specially referred to John M. Hill, Esquire, as Special Master, to take testimony as to the solvency or insolvency of the Independence Shares Corporation and to make his report to the court at the earliest possible date.

The report of the special master as to the solvency or insolvency of the Independence Shares Corporation will be of material assistance in the final determination of the prayer for the appointment of a receiver.

Further disposition in this proceeding will await the Special Master's report.

[fol. 454] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTIONS TO DISMISS, ETC.—Filed May 18, 1939

And Now, to wit, the eighteenth day of May, 1939, all motions to dismiss this action are denied, and the aboveentitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a court stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible; and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.

By the Court.

IN UNITED STATES DISTRICT COURT

EXCEPTIONS TO ORDER—Filed May 25, 1939

And Now this twenty-third day of May, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above as follows:

[fol. 455] "And Now, to wit, the 18th day of May, 1939, all motions to dismiss this action are denied, and the aboveentitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solveney or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania Corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a Court Stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible, and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.

By the Court.

(Sgd.) Kalodner, J."

on the grounds and for the reason that

- (a) The Order denying the motion to dismiss the above action is contrary to law, and
- (b) The Order referring the matter to John M. Hill, Esquire, to determine the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation) is contrary to law and against the evidence presented in this case, it appearing from the record that the uncontradicted testimony shows that the defendant, Independence Shares Corporation (a Pennsylvania corporation) is solvent.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

[fol. 456]. IN UNITED STATES DISTRICT COURT

Exceptions of the Pennsylvania Company for Insurances on Lives and Granting Annuities, One of the Defendants—Filed May 24, 1939

And Now, to wit, this twenty-fourth day of May, 1939, comes The Pennsylvania Company for Insurances on Lives and Granting Annuities, one of the defendants in the above entitled action, through-its attorneys, Saul, Ewing, Remick & Saul, Esquires, and files the following exceptions:

- 1. Said defendant excepts to the action of the Court on May 18, 1939, in refusing said defendant's separate motion for dismissal as follows:
 - "For the reasons stated the D fendants' separate motions to dismiss are refused."
 - 2. Said defendant excepts to the action of the Court in entering an order on May 18, 1939 as follows:
- "And Now, to wit, the 18th day of May, 1939, all motions to dismiss this action are depied, and the above-entitled matter is referred to John M. Hill, Esquire, as Special Master, and the Special Master is hereby ordered, directed and authorized to hear and determine an issue raised in this case, to wit, the question of the solvency or insolvency of the defendant, Independence Shares Corporation (a Pennsylvania corporation), and to that end to take and hear testimony bearing upon that issue, the said testimony to be taken by a Court Stenographer, transcribed and submitted to this Court, together with the report of the Special Master. The said report of the Special Master shall be submitted as expeditiously and promptly as may be possible, and shall contain the Special Master's findings of fact and law upon the question of the solvency or insolvency of the said defendant, together with whatever discussion of law [fol. 457] the Master deems proper and necessary. Jurisdiction of this entire case is meanwhile retained by this Court.
 - By The Court: (Sg.) Kalodner, J." Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO CAPTION AND COMPLAINT BY ADDING J. H. VAN SCIVER AS PARTY PLAINTIFF—Filed May 25, 1939

And Now, to wit, this twenty-fourth day of May, 1939, the caption of the above entitled matter is amended by adding thereto J. H. Van Sciver as party plaintiff and by amending the complaint by adding thereto paragraph 12(a) as follows:

12(a). J. H. Van Sciver is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of Capital Savings Plan Contract Certificate No. B5110 in the sum of \$4000 dated October 19, 1932 and Capital Savings Plan Contract Certificate No. B7809 in the sum of \$6000 dated July 16, 1935 purchased by him from Capital now Independence Shares Corporation, a defendant herein, and on which contracts the said J. H. Van Sciver has paid in on account thereof the sum of \$3010.

(Sgd.) Harry Shapiro, Attorney for Plaintiff.

Approved: Kalodner, J.

[fol. 458] IN UNITED STATES DISTRICT COURT

Amendment to Caption and Complaint by Adding James H.
Irvin as Party Plaintiff—Filed May 25, 1939

And Now, to wit, this twenty-fourth day of May, 1939, the caption of the above-entitled matter is amended by adding thereto James H. Irvin as party plaintiff and by amending the complaint by adding thereto paragraph 12(b) as follows:

12(b). James H. Irvin is a citizen and resident of the Commonwealth of Pennsylvania and is the owner and holder of a full-paid Capital Savings Plan Contract Certificate No. B8073 in the sum of \$3000 dated February 21, 1936, purchased by him from Capital, now Independence Shares Corporation, a defendant herein, and on which the said James H. Irvin has paid in the full amount thereof.

(Sgd.) Harry Shapiro, Attorney for Plaintiffs.

Approved: Kalodner, J.

IN UNITED STATES DISTRICT COURT

EXCEPTION TO ORDER—Filed June 2, 1939

And Now, this twenty-ninth day of May, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above on May 25, 1939, adding James H. Irvin and J. H. Van Sciver as party plaintiffs for the reason that the said order of the Court is contrary to law.

(Sgd.) Robert F. Irwin, Jr., Attorney for Defendants.

[fol. 459] IN UNITED STATES DISTRICT COURT

Exception of the Pennsylvania Company for Insurances on Lives and Granting Annuities to Order—Filed May 31, 1939

And now, to wit, this thirty-first day of May, 1939, the defendant, The Pennsylvania Company for Insurances on Lives and Granting Annuities, excepts to the order of this Court filed in the above entitled case on May 25, 1939, adding James H. Irvin and J. H. Van Sciver as parties plaintiff for the following reasons:

- 1. The addition of the parties plaintiff is not an amendment to the pleadings permitted by the rule of court.
- 2. The adding of additional parties plaintiff to give this Court jurisdiction upon the basis of the amount in controversy is contrary to law.
- · 3. Said order is otherwise contrary to law.

Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities. [fol. 460] IN UNITED STATES DISTRICT COURT

ORDER RESTRAINING AND ENJOINING DEFENDANTS-Filed June 2, 1939

And now, to wit, this second day of June, 1939, upon consideration of the motion for preliminary injunctions filed in the above-entitled matter, and on motion of Harry Shapiro, Esq., attorney for the plaintiffs, it is

Ordered, Adjudged and Decreed:

- (a) That the defendant Pennsylvania Company for Insurances on Lives and Granting Annuities be and hereby is restrained and enjoined from paying over, assigning, crediting, delivering, transferring or otherwise disposing of, to the other defendants, or any of them, or to any other persons or persons, directly or indirectly, in any manner whatsoever, the sum of \$38,258.85 representing certain charges made by the said other defendants in connection with the reinvestment of a certain proceeds realized from the liquidation of certain of the underlying securities of Independence Trust Shares, and from the semi-annual income from securities underlying Independence Trust Shares; and
- (b) That the said other defendants and each of them, and any other person or persons, be and they hereby are enjoined and restrained from receiving from the Pennsylvania Company for Insurances on Lives and Granting Annuities, and using, directly or indirectly, in any manner whatsoever the aforesaid sum of \$38,258.85.

Security to be entered in the sum of \$1000.

By the Court, (Sgd.) Kalodner, J.

Approved as to form: Robert F. Irwin, Jr., Esq., Francis H. Bohlen, Esq.

[fol. 461] IN UNITED STATES DISTRICT COURT

EXCEPTION TO ORDER OF JUNE 2, 1939-Filed June 15, 1939

And now, this fifteenth day of June, 1939, the defendants, Independence Shares Corporation (a Pennsylvania corporation), Alfred H. Geary, Frank McCown, Jr., Robert E.

Bonner, Herace M. Barba, and Eckley B. Coxe, 3d, by their attorney, Robert F. Irwin, Jr., take exception to the order of the Court filed in the above on June 2, 1939, restraining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and Independence Shares Corporation from receiving the sum of \$38,258.85.

Robert F. Irwin, Jr., Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

Exception—Filed June 15, 1939

And now, to wit, this fifteenth day of June, 1939, The Pennsylvania Company for Insurances on Lives and Granting Annuities, by its attorneys, Saul, Ewing, Remick & Saul, Esquires, excepts to the order and decree of this Court entered June 2, 1939, upon the motion of the complainants for preliminary injunction.

Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 462] IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed June 5, 1939

Notice is hereby given that Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, hereby appeal to the Circuit Court of Appeals for the Third Circuit from the order of the United States District Court for the Eastern District of Pennsylvania, restraining and enjoining Independence Shares Corporation from receiving and The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying over the sum of \$38,258.85, being that part of a distribution upon Independence Trust Shares received by The Pennsylvania Company for Insurances on Lives and Granting Annuities on or about April 1, 1939, representing certain charges made by Independence Shares Corporation in connection with reinvestment of certain proceeds realized from the liquidation of certain of the

underlying recurities of Independence Trust Shares, and semi-annual income from securities underlying Independence Trust Shares then distributable, entered in this action on June 2, 1939; and from the order adding James H. Irvin and J. H. Van Sciver, as party plaintiffs, entered in this action on May 25, 1939; and from the order denying the motions of the above named defendants to dismiss the action, referring the matter to a special master to determine the issue of solvency entered in this action May 18, 1939.

(Sgd.) Robert F. Irwin, Jr. .

[fol. 463] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL-Filed June 8, 1939

Notice is hereby given that The Pennsylvania Company for Insurances on Lives and Granting Annuities hereby appeals to the Circuit Court of Appeals for the Third Circuit from the order of the United States District Court for the Eastern District of Pennsylvania, restraining and enjoining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying over and Independence Shares Corporation from receiving the sum of \$38,-258.85, being that part of a distribution upon Independence Trust Shares received by The Pennsylvania Company for Insurances on Lives and Granting Annuities on or about April 1, 1939, representing certain charges made by Independence Shares, Corporation in connection with reinvestment of certain proceeds realized from the liquidation of certain of the underlying securities of Independence Trust Shares, and semi-annual income from securities underlying Independence Trust Shares then distributable, entered in this action on June 2, 1939; and from the order adding James H. Irvin and J. H. Van Sciver, as party plaintiffs, entered in this action on May 25, 1939; and from the order denying the motion of the above-named defendant to dismiss the action and referring the matter to a Special Master to determine the issue of solvency entered in this action May 18, 1939.

Francis H. Bohlen, Jr., Saul, Ewing, Remick & Saul, Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

[fol. 464] IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY—Filed June 15, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The following is a statement of points on which the appellants, Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, intend to rely:

- 1. The proceedings in the District Court and the restraining order and injunction there granted in this matter are void and the Court is without jurisdiction because:
- (a) The complainants named in the bill of complaint are not proper parties to bring a bill for a receiver.
- (b) No onesof the complainants has established a claim over \$3000.
 - (c) There is an improper joinder of complainants.
- (d) Complainants have failed to show requisite diversity of citizenship.
- (e) The complainants have no status under the Securities Act of 1933 to seek the appointment of a receiver for the defendant, Independence Shares Corporation.
- 2. The defendant, Independence Shares Corporation, is solvent and therefore the action should be dismissed by the District Court.

(Sgd.) Robert F. Irwin, Jr.

[fol. 465] IN UNITED STATES DISTRICT COURT

STATEMENT OF THE POINTS UPON WHICH THE APPELLANT INTENDS TO RELY—Filed June 16, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit:

The following is a statement of the points upon which the appellant, The Pennsylvania Company for Insurances on . Lives and Granting Annuities, intends to rely:

- 1. The proceedings in the District Court and the restraining order and injunction granted there in this matter are void and the Court is without jurisdiction because:
- (a) The amount in controversy is less than \$3000 exclusive of interest and costs.
- (b) There is lack of the required diversity of citizenship.
- (c) The Court has no power under the Securities Act of 1933 or under its general equitable powers to grant the relief sought by the complainants.
- 2. The bill of complaint failed to allege any facts justifying the transfer of the trust assets to a receiver appointed for Independence Shares Corporation for the purpose of liquidation or for any other purpose.
- 3. The complainants have no status under the Securities Act of 1933 to seek relief as against The Pennsylvania Company for Insurances on Lives and Granting Annuities or to pursue remedies vested solely in the Securities and Exchange Commission.
- 4. The Pennsylvania Company for Insurance on Lives and Granting Annuities is imporperly joined as party defendant.
- [fol. 466] 5. The complainants have separate and adequate remedies at law.
 - 6. The additional complainants were improperly joined.
 - Saul, Ewing, Remick & Saul, by Francis H. Bohlen, Jr., Attorneys for Apriellant.

[fol. 467] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 468] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

\1939 No. 7146

INDEPENDENCE SHARES CORPORATION, et al., Appellants,

VS.

ROBERT J. DECKERT, et al., Appellees

Petition for Supersedeas and Stay of Proceedings

The Petition of Independence Shares Corporation respectfully represents:

- 1. That it is one of the defendants in Robert J. Deckert et al. v. Independence Shares Corporation et al, 218 of Civil Action of 1939 in District Court of United States for the Eastern District of Pennsylvania and is named as a principal defendant in Bill of Complaint.
- 2. That Independence Shares Corporation is a Pennsylvania corporation engaged in the business of buying common stocks of 35 specific corporations in units of one share of each of such stocks, depositing such unit with The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee, and receiving in exchange therefor 1,000 Independence Trust Shares for each such unit so deposited.
- 3. That Independence Shares Corporation, as a part of its business, sells Independence Trust Shares, and in addition, it and its predecessor Capital Savings Plan, Inc. is and were in the business of issuing and selling plans and contracts to Investors under the terms of which plans or [fol. 469] contracts the Investor could make a lump sum payment or installment payments to a Custodian or Trustee to be applied after certain authorized deductions to the purchase of Independence Trust Shares for the account of the individual Investor. Some of the contracts formerly issued by Capital Savings Plan, Inc. and now outstanding were issued with life insurance features insuring the unpaid balances due on such insured contracts at the time of the death of such Investor.

- 4. That The Pennsylvania Company for Insurance on Lives and Granting Annuities is Trustee of the common stocks underlying Independence Trust Shares and is Trustee under several trust agreements, relating to the contracts formerly issued by Capital Savings Plan, Inc. and is custodian under the plans issued by Independence Shares Corporation.
- 5. That the Independence Trust Shares held by The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or Custodian, are held as the sole property and for the separate account of the Investors. The Independence Trust Shares certificates for Investors are issued in the name of The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or Custodian, and a separate card record for each Investor, showing the number of trust shares to which he is entitled to five decimal places, is kept by said Trustee or Custodian.
- \6. That the Bill of Complaint seeks a receivership of the assets of Independence Shares Corporation, all Independence Trust Shares issued, and all common stocks underlying Independence Trust Shares.
- 7. That your petitioner is informed by counsel, believes and therefore avers that the Independence Trust Shares and the common stocks underlying Independence Trust [fol. 470] Shares are not the assets of Independence Shares Corporation and are in no way subject to claims again Independence Shares Corporation but are the sole property of the persons who own them or for whose account they are held.
- 8. That there are outstanding approximately 2,000,000 trust shares of which approximately 1,700,000 are held for the account of approximately 18,000 Investors and approximately 300,000 are held independently of Investors holding contracts issued by Capital Savings Plan, Inc. and Plans issued by Independence Shares Corporation. Only nine holders of Capital Savings Plan contracts originally joined as parties plaintiff in the Complaint herein; two additional Capital Savings Plan, Inc. contract holders have been joined by Order of the District Court, to which Order your petitioner has taken exception.
- 9. That the Independence Shares Corporation is in the business of selling securities and is therefore especially

jealous of its reputation and, as such, is subject to extraordinary damaging consequences for actions reflecting upon its financial standing and business reputation.

- 10. That on June 2, 1939 the Court below entered an Order restraining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and the Independence Shares Corporation from receiving the sum of \$38,258.85, being the amount due by The Pennsylvania Company for Insurances on Lives and Granting Annuities to the Independence Shares Corporation.
- 11. That pending the disposition of the appeal the Court below has ordered the defendant, Independence Shares Corporation, to proceed to the taking of testimony before a Mas-[fol. 471] ter appointed by Order of May 18, 1939 and at a hearing on June 20, 1939 stated that such hearings should be concluded so that the Master's report would be filed within two or three weeks from that date.
- 12. That unless your petitioner's appeal raising the fundamental question of the jurisdiction of the court below is made a supersedeas, there is grave danger of the court below acting on the pending motion to appoint a receiver. Any action by the court below in appointing a receiver would cause irreparable damage to your petitioner which could never be compensated for by a judgment of your Honorable Court on the appeal reversing the lower court.
- 13. That your petitioner believes that the civil action of the complainants is without legal justification and that the appointment of a receiver for the assets of the Independence Shares Corporation, the Independence Trust Shares belonging to each owner and Investor, and the common stocks underlying Independence Trust Shares, prior to disposition of the pending appeal, would cause irreparable harm to your petitioner and the 18,000 Investors.
- 14. That the appointment of a receiver would force the defendant, Independence Shares Corporation, to breach its contractual obligations to Investors and other owners of Independence Trust Shares, and cause The Pennsylvania Company for Insurances on Lives and Granting Annuities to break its contractual obligations with the said Investors and owners, thus causing irreparable harm and damage to the individual Investors and owners of Independence Trust

Shares and to the business, reputation and financial standing of the defendant, Independence Shares Corporation.

15. That the appointment of a regiver would cause the lapse of the blanket 'arm life insurance policy, insuring unpaid balances due of insured contracts now held by application [fol. 472] proximately 1,000 Investors, which policy, in such event, could not be reinstated or replaced, to the irreparable damage of the 11,000 Investors.

16. That this petition is not interposed for delay, but is for the purpose of obtaining relief from possible irreparable injury caused by the continuance of the proceedings in the Court below pending disposition of the appeal.

Wherefore, your petitioner prays this Honorable Court to grant a supersedeas and direct that the District Court of the United States for the Eastern District of Pennsylvania be ordered to stay proceedings in the matter of Robert J. Deckert et al. v. Independence Shares Corporation et al.

And your petitioner will ever pray, etc.
Independence Shares Corporation, by Alfred H.
Geary, President.

[fol. 473] STATE OF PENNSYLVANIA, County of Philadelphia, ss:

Alfred H. Geary, being duly sworn according to law, deposes and says that he is President of Independence Shares Corporation, petitioner named in the foregoing petition; that he is authorized to make this affidavit on its behalf; that he has read the foregoing petition and believes that the facts set forth therein are true and correct to the best of his knowledge; information and belief.

Sgd. Alfred H. Geary.

Sworn to and subscribed before me this 24 day of June, 1939. Crawford A. Battle, Notary Public. My Commission Expires March 9, 1943. (Seal.)

Endorsements: Petition for Supersedeas and Stay of Proceedings. Received & Filed, June 27, 1939. William P. Rowland, Clerk.

[fol. 474] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7146

INDEPENDENCE SHARES CORPORATION, et al., Appellants,

VS.

ROBERT J. DECKERT, et al., Appellees

1939

JOINDER IN PETITION FOR SUPER SEDEAS

The Pennsylvania Company for Insurances on Lives and Granting Annuities joins in the petition of Independence Shares Corporation for a supersedeas for the following reasons:

- 1. It is trustee or custodian for approximately 18,000 holders of Capital Saving Plan Contract Certificates and Independence Trust Shares Purchase Plans and also trustee for 1418 holders of Independence Trust Shares, 1414 of whom have no connection with Capital Savings Plan Contract Certificates or Independence Trust Shares Purchase Plans.
- 2. In its capacity as trustee or custodian aforesaid, it holds trust assets having a value in excess of \$4,000,000 and neither Independence Shares. Corporation nor any of the other defendants, except to the extent that they may hold a limited amount of Independence Trust Shares; have any right, title or interest in and to said trust assets.
- 3. The Complainants, the Appellees in this appeal seek the appointment of a receiver of Independence Shares Corporation with the power to take possession of the trust assets, and The Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee or custodian would as trustee be in duty bound to refuse to deliver any of the trust assets in its hands to a receiver unless and until this Court upon appeal, affirmed any order or decree directing [fol. 475] any such remedy.
- 4. In view of the above, The Pennsylvania Company for Insurances on Lives and Granting Annuities submits that the power of the Court below to grant any such drastic remedy should first be determined by this Court, and that

pending such determination the rights and interests of said beneficiaries should be safeguarded by staying further proceedings in the Court below.

Wherefore The Pennsylvania Company for Insurances on Lives and Granting Annuities respectfully urges that this

Court grant a supersedeas in this case.

Saul, Ewing, Remick & Saul, by Francis H. Rohler, Jr., Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities.

Endorsements: Joinder in Petition for Supersedeas. Received & Filed, Jun. 28, 1939. William P. Rowland, Clerk.

[fol. 476] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 7146. March Term, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, et al., Appellants,

VS.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees
No. 7147. March Term, 1939

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Appellant,

VS.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees

And afterwards, to wit, the 7th day of July, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Petition for Supersedeas, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Francis Biddle, Circuit Judges, [and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the —— day of —— come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the

following decision: 1 *6

^{* [}Words enclosed in brackets struck out in copy.]

[fol. 477] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 7146. March Term 1939

INDEPENDENCE SHARES CORPORATION, et al., Appellants

VS.

ROBERT J. DECKERT, et al., Appellees.

Before Biggs, Clark and Biddle Circuit Judges

ORDER DENYING PETITION FOR SUPERSEDEAS, ETC.

After due consideration it is ordered that the petition of Appellants for Supersedeas and stay of proceedings in the District Court be and the same is hereby denied.

Philadelphia, July 7, 1939.

Francis Biddle, Circuit Judge.

Endorsements: Order Denying Petition for Supersedeas, etc. Received & Filed, Jul. 7, 1939. William P. Rowland, Clerk.

[fol. 478] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7146. March Term, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, et al.,
Appellants,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, et al., Appellees
No. 7147. March Term, 1939

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND
GRANTING ANNUITIES, Appellant,

VB.

ROBERT J. DECKERT, ROLAND W. RANDAL, et. al., Appellees

And afterwards, to wit, the 7th and 9th days of August, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark and Honorable Charles Alvin Jones, Circuit

Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof, And afterwards, to wit, on the 11th day of November, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 479] IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 7146. MARCH TERM, 1939

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, Appellants,

V:

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, and Abe Zubrow, Appellees

No. 7147. MARCH TERM, 1939

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Appellant,

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow, Appellees,

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

Opinion—Filed November 11, 1939

[fol. 480] Before Biggs, Clark and Jones, Circuit Judges Biggs, Circuit Judge:

A bill of complaint was filed in the court below by the appellees against the appellant, Independence Shares Corporation, a Pennsylvania corporation, and certain affiliated companies. The appellees purchased Capital Savings Plan-

Contract Certificates issued by Capital Savings Plan, Inc., and have alleged in their bill of complaint that these were sold to them by the fraud and misrepresentations of Capital Savings Plan, Inc., by the use and means of instruments of transportation or communication in interstate commerce and by the use of the mails. At the time of the sales, Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. Upon December 31, 1938, however, Capital Savings Plan, Inc., and Independence Shares, Inc., merged and the appellant, the resultant corporation, acquired all of the assets and assumed all of the liabilities of Capital Savings Plan, Inc.

The bill of complaint also alleges that the assets of Independence Shares Corporation are being wasted and dissipated and that that corporation is insolvent. The bill prays the appointment of a receiver for the assets of the corporation who shall ascertain and adjudicate the claims of creditors and shall liquidate and dissolve the company. The complaint also asks for certain injunctive relief which we will discuss at a later point in this opinion. The bill is east in the form of a class suit brought by the appelleees not only on their own behalf but also for the benefit of all cer-

tificate holders similarly situated.

The court below denied motions to dismiss the bill of complaint made upon the ground that it stated no cause of action and that the court was without jurisdiction, and referred the case to a master to hear and report upon the question of solvency or insolvency of the appellant. This order, filed May 18, 1939, has been appealed from by Inde-

pendence Shares Corporation.

[fol. 481] The contract certificates purchased by the appellees called for payments to be made by the subscribers. These payments were made by the subscribers to the other appellant, The Pennsylvania Company for Insurances on Lives; and Granting Annuities as trustee. The Pennsylvania Company made certain deductions from the sums paid to it and invested the balance as directed by Independence Shares Corporation in Independence Trust Shares for the accounts of the respective certificate holders. Independence Shares Corporation created these trust shares by itself purchasing the shares of stock of certain specified corporations. The trust shares represent interests in the stocks so bought. The Pennsylvania Company in turn purchased alignot portions of the trust shares and holds its purchases

as we have stated for the benefit of the accounts of the certificate holders. At the time of the filing of the bill of complaint a sum of money representing charges made by the appellant for the reinvestment of funds was in the possession of The Pennsylvania Company. By an order entered June 2, 1939, the court below enjoined The Pennsylvania Company from paying over the sum referred to to Independence Shares Corporation or otherwise disposing of it during the pendency of the action. The Pennsylvania Company has appealed from this order.

Since the two appeals grow out of the same set of facts,

we will dispose of them in one opinion.

The complainants with one exception are citizens of Pennsylvania. The jurisdiction of the court below cannot be sustained therefore upon diversity of citizenship. Lee v. Lehigh Valley Coal Company, 267 U. S. 542; Salem Trust Co. v. Manufacturers Finance Company, 264 U. S. 182; Osthaus v. Button, 70 F. (2d) 392. Nor does the amount in controversy exceed the sum of \$3,000. Section 24(1) of the Judicial Code as amended, 28 U. S. C. A. 41(1). The claims of the appellees may not be aggregated and the claim of no one appellee amounts to more than \$2,000. Moore's [fol. 482] Federal Practice, Vol. 2, Section 23.08; Pinel v. Pinel, 240 U. S. 594; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77.

In our opinion, none the less, the court below had jurisdiction of the controversy by virtue of the provisions of Sections 12(2) and 22(a) of the Securities Act of 1933 (May 27, 1933, c. 38, Title I, 48 Stat. 84 and 86 (15 U. S. C. A. 771.(2) & 77v.(a)).

Section 22(a) provides that "The district courts of the United States, * * shall have jurisdiction of offenses and violations under this title * * * and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title * * *".

Section 12(2) of the Act states that "Any person who sells a security by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, and who shall not sustain the burden of proof that he did not know,

of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Jurisdiction in this case, however, is not dependent upon diversity of citizenship and amount in controversy. field which is carved out for the operation of federal jurisdiction by Section 22(a) is "all suits in equity and actions at law brought to enforce any liability or duty created by this title." Since the Act stems from the exercise of fed-[fol. 483] eral power under the commerce clause there is no

question raised in the case on the line of power.

Section 12(2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of. a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person in the "civil action" prescribed by Rule 2 of the Federal Rules of Civil Procedure. The nature of the suit, however, remains as specified by Section 12(2). The defrauded person must seek to recover "the consideration" paid by him. The relief given by the section is for a money judgment or for a money decree payable to the individual who has been defrauded.

Section 16 of the Act, 48 Stat. 84, (15 U. S. C. A. 77p.) providing that "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity", does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12(2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act.

Since the recovery of the appellees is limited as we have indicated, it follows that The Pennsylvania Company is not

a proper party to the suit. The appellees have stated no cause of action against it and indeed have alleged no breach of duty upon its part cognizable under the Securities Act or otherwise. The injunction against The Pennsylvania Company therefore may not be maintained. Nor does Section [fol. 484] 12(a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497, and the authorities there cited. It follows that none of the prayers of the bill of com-

plaint asking for specific relief may be granted.

The complaint states a cause of action within the purview of Section 12(2) of the Securities Act, however, and ends with a general prayer for relief. Amendment may be made to the complaint pursuant to R. S. 954 (28 U. S. C. A. 777) and Rule 15(a) of the Rules of Civil Procedure by limiting this prayer to a demand for money judgment. amendment would be one of form rather than of substance since the complaint sets forth every fact necessary to entitle the appellees to obtain such relief. It is clear from the complaint that the appellees seek the recovery of the consideration paid by them for their contract certificates and by the contents of the complaint Independence Shares Corporation is made fully aware of the charges which it must meet. United States v. Powell, 93 F. (2d) 788. See McAndrews v. C. L. S. & E. R. Co., 162 F. 856. As was stated by the Supreme Court in Maty v. Grasselli Chemical Co., 303 U. S. 197, 200, "Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end."

The complaint sets forth a cause of action at law rather than in equity, for while Independence Shares Corporation may occupy a fiduciary relationship toward the appellees and the other certificate holders, none the less the action given by Section 12(2) of the Securities Act is one against the seller of the securities for the recovery of money. The type of amendment from equity to law formerly permitted under Equity Rule 22 is no longer necessary in view of Rule 2 of the Rules of Civil Procedure. The complaint as amended will serve as a continuation of the old suit, the [fol. 485] filing of the original bill tolling the statute of limitations imposed by Section 13 of the Securities Act (15 U. S.

C. A. 77(m)). See Friederichsen v. Renard, 247 U. S. 207, 213 and the decisions there cited. It must also be borne in mind that under Rule 15(c) of the Rules of Civil Procedure, an amendment when made relates back to the date of the original pleading.

The question of whether the appellees upon a proper showing might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12(2) of the Act, is not before us and

therefore we do not pass upon it.

In conclusion we state that the appellants contend that Section 12(2) of the Act gives the appellees no right to maintain their suit as a class action. We are unable to agree with this contention. The suit at bar is of the type denominated a "spurious" class suit and may be maintained under Rule 23(a)(3) of the Federal Rules of Civil Procedure. See Moore's Federal Practice, Vol. 2, p. 2241, paragraph 23.04-(3). In the case at bar numerous persons are interested in common questions of law or fact affecting the several rights of many individuals. Common relief may be sought 1 despite the fact that individuals may recover separate judgments different in amounts. It should be noted that the misrepresentations set forth by the bill are alleged to be common to the sales made by the agents of the appellant company and of Capital Savings Plan, Inc. to the appellees and the other subscribers upon whose behalf the suit was instituted. We do not at this time express an opinion upon the question whether subscribers who are not now named as parties plaintiff may intervene in the cause in view of the statute of limitations set up in the Act.

[fol. 486] Accordingly the orders appealed from are reversed and the cause is remanded with directions to proceed

in conformity with this opinion.

A true Copy:

Teste:

of Appeals for the United States Circuit Court

¹ Moore's Federal Practice states in respect to "spurious" class suits: "This is a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clean up a litigious situation."

[fol. 487] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7146

Independence Shares Corporation, Alfred H. Geary, Frank McGown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, Appellants,

vs.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow, Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it it now here ordered, adjudged, and decreed by this Court that the orders of the said District Court appealed from in this cause be, and the same are hereby reversed, with costs, and the cause remanded to the said District Court with directions to proceed in conformity with the opinion of this court.

Philadelphia, November 11, 1939.

John Biggs, Jr., Circuit Judge.

Endorsements—Order Reversing Orders of District Court. Received & Filed Nov. 11, 1939. Wm. P. Rowland, Clerk.

[fol. 488] In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1939

No. 7147

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Appellant,

VS.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMP-TON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow, Appellees

Appeal from the District Court of the United States, for the District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it it now here ordered, adjudged, and decreed by this Court that the orders of the said District Court appealed from in this cause be, and the same are hereby reversed, with costs, and the cause remanded to the said District Court with directions to proceed in conformity with the opinion of this court.

Philadelphia, November 11, 1939.

.. John Biggs, Jr., Circuit Judge.

Endorsements—Order Reversing Orders of District Court etc. Received & Filed Nov. 11, 1939. William P. Rowland, Clerk.

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[fol. 490] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7146

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, Appellants,

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMP-TON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, Appellees

· No. 7147

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, Appellant,

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMP-TON, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky and Abe Zubrow, Appellees

Answer to Petition for Rehearing

To the Honorable, the Judges of the Circuit Court of Appeals for the Third Circuit:

The answer of the appellants, Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert [fol. 491] E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, to the petition for rehearing filed by the appellees in the above-entitled matter, respectfully represents:

- 1. The appellants aver that the allegations set forth by appellees in their petition for rehearing are irrelevant to a consideration of whether a rehearing should be granted, and in view of certain mis-statements contained in the petition, the appellants feel that, while these statements are irrelevant to a determination of the question before the Court, they cannot let such statements go unchallenged.
 - 2. The appellees in their petition have stated that

"Independence Shares Corporation has neither challenged, disputed nor denied the facts on the basis of which Judge Kalodner entered the order enjoining the receipt by it of the \$38,258.85"

and that

"Since the defendants have neither challenged, disputed nor denied the findings of fraud in connection with their stock-selling scheme"

and that

"Independence Shares Corporation does not challenge, dispute or deny that the charges * * were concealed from and deliberately misrepresented to your petitioners".

The appellants deny the correctness of the above-quoted statements, and the appellants have always denied that there existed fraud or misrepresentations in the sale of the securities by them, and in the answer filed in the Court below (R. pp. 56-110) all allegations of fraud and misrepresentation averred in the appellees' complaint have been denied.

3. Appellees in their petition for rehearing have stated as a fact that Judge Kalodner held

[fol. 492] "that Independence Shares Corporation was liable to all subscribers for the money paid in by them?".

No such finding was made in the Court below as is evidenced by what the Judge said in open court following the filing of his written opinion and in answer to a request by appellees' counsel based upon the assumption that Independence Shares Corporation was liable to all subscribers. At page 396 of the record the following appears:

"The Court: If there was fraud and misrepresentation, concealment as to material facts of which the plan holders were ignorant." It must be subject to that reservation. There may be persons in this case—I am not passing finally on it—there may be persons in this case to whom no misrepresentation was made, or concealment of facts. If so, unless there is liquidation of the company, they have no complaint."

4. The appellees have had one rehearing in this matter and at the conclusion thereof, the Court asked the attorney for the appellees whether he had stated everything he wished to and the answer was in the affirmative.

There has been a complete presentation of the questions involved in this case and the Court decided these questions. There nowhere appears in the appellees' petition for rehearing any reason for this Court to rehear this matter which has been argued before this Court twice.

Wherefore, it is respectfully submitted that the petition for rehearing should be denied.

Respectfully submitted, Robert F. Irwin, Jr., George M. Kevlin, Joseph Whetstone, Harris J. Latta, Jr., Donahue, Irwin, Merritt & Gest, Townsend, Elliott & Munson.

[fol. 493] The Pennsylvania Company for Insurances on Lives and Granting Annuities, appellant, also respectfully requests the Court to deny the petition for rehearing.

Walter B. Saul, Francis H. Bohlen, Jr., Saul, Ewing,

Remick & Saul.

[fol. 494]. In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1939

No. 7146

Independence Shares Corporation, et al., Defendants-Appellants,

vs.

ROBERT J. DECKERT, et al., Plaintiffs-Appellees,

Sur Retition for Rehearing

And Now, to wit, December 20, 1939, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, —

John Biggs, Jr., Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Dec. 20, 1939. William P. Rowland, Clerk. [fol. 495] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, MARCH TERM, 1939

No. 7147

PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANT-ING ANNUITIES, Defendant-Appellant.

VS.

ROBERT J. DECKERT, et al., Plaintiffs-Appellees
Sur Petition for Rehearing

And Now, to wit, December 20, 1939, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, -

John Biggs, Jr., Circuit, Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed Dec. 20, 1939. William P. Rowland, Clerk.

[fol. 496] UNITED STATES OF AMERICA,

Eastern District of Pennsylvania,

Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the cases of Independence Shares Corporation, et al., Appellants, vs. Robert J. Deckert, et al., Appellees, No. 7146; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, appellant, vs. Robert J. Deckert, et al., appellees, No. 7147; on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of January in the year of our Lord one thousand nine hundred and forty, and of the Independence of the United States the one hundred and sixty-fourth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of

Appeals, Third Circuit. (Seal.)

[fol. 497] SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1940

No. 17

ORDER ALLOWING CERTIONARI-Filed March 25, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is

granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration and decision of this application.

[fol. 498] SUPREME COURT OF THE UNITED STATES

Остовев Тевм, 1940

No. 18

ORDER ALLOWING CERTIORARI—Filed March 25, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration and decision of this application.

Endersed on cover: File Nos. 44,140, 44,141. U. S. Circuit Court of Appeals, Third Circuit. Term No. 17. Robert J. Deckert, Roland W. Randal, David W. Compton, et al., Petitioners, vs. Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., et al. Term No. 18. Robert J. Deckert, Roland W. Randal, David W. Compton, et al., Petitioners, vs. The Pennsylvania Company for Insurance on Lives and Granting Annuities. Petition for writs of certiorari and exhibit thereto. Filed February 17, 1940. Term Nos. 17, O. T., 1940; 18, O. T., 1940.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES OCCUPANT OCTOBER TERM, 1939

No. 23 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

INDEPENDENCE SHARL & CORPORATION, ALFRED H. GEARY, FRANK McCOWN, Jr., ET AL.

No. 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY SHAPIRO, Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1939

No. 733

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, Jr., ET AL.

No. 734

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES
ON LIVES AND GRANTING ANNUITIES.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin, and J. S. Van Sciver, by their attorney, Harry Shapiro, Esquire, respectfully prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Third Circuit, entered on November 11, 1939, reversing certain orders entered by the District Court of the United States for the Eastern District of Pennsylvania.

Statement of Case.

On March 11, 1939, petitioner planholders filed a class action in the United States District Court for the Eastern District of Pennsylvania against the respondents: Independence Shares Corporation, a trust and investment corporation (hereinafter referred to as "Independence"); Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, officers and directors of Independence; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, a bank, (hereinafter referred to as "Pennsylvania Company").

The complaint alleges that:

- (a) Independence and its predecessor, Capital Savings Plan, Inc. (hereinafter referred to as "Capital") in the sale of savings plan contract certificates and trust shares to your petitioners and many others, by the use and means of instruments of transportation and communication in interstate commerce and by the use of the mails, had defrauded your petitioners and many others of both money and property, by means of untrue statements, misrepresentations and concealments, in violation of the Securities Act of 1933;
- (b) The Pennsylvania Company as trustee collected the payments from planholders and made certain deductions therefrom and invested the balance under the instructions

of Independence in Independence Trust Shares for the accounts of the respective planholders. These trust shares were created by Independence and represented a 1/1000 interest in a portfolio consisting of one share of each of certain underlying stocks purchased by Independence for the creation of the said trust shares;

- (c) A concealed, arbitrary "overwrite" or "load" was added to the price of the trust shares;
- (d) Independence and its predecessor, Capital, consented to an injunction restraining their further violation of the Securities Act of 1933, pursuant to the prayers of a Bill in Equity filed against them by the Securities and Exchange Commission on June 22, 1938, charging violation of the said Act;
- (e) Independence thereafter recognized and admitted a contingent liability estimated by it to approximate \$3,500,000.00 arising out of sales in violation of the Securities Act;
- (f) There has been adverse publicity causing a virtual cessation of business and sales of Independence, although expenses, overhead and excessive fees continue, making impossible any profit to subscribers; and
- (g) Independence is insolvent, and its funds and assets, and the trust assets held by the Pennsylvania Company, all of which are controlled by Independence, are being dissipated and wasted;

and prays that:

(a) A receiver be appointed for the defendant Independence with power to take into his possession all of its assets and all of the trust assets held by the Pennsylvania Company, and to liquidate and distribute the said assets among the persons entitled thereto.

After numerous hearings, District Judge Kalodner, on May 18, 1939, filed an Opinion holding that the Federal Court had jurisdiction over this cause of action; that the "testimony overwhelmingly substantiated the allegations in the Bill of Complaint"; and that Independence was liable to all subscribers for the money paid in by them (R. 439-441).

Specifically, the learned Chancellor found that many fraudulent and untrue statements and representations were made to planholders and prospective planholders by the respondent vendors, their officers and salesmen; that the respondent vendors and their officers gave written and verbal instructions to the salesmen which directed them to use these fraudulent and untrue statements and representations; and that included in such fraudulent and untrue statements and representations were the following:

- (a) That the plan was a "savings plan" paying a high rate of interest:
- (b) That the various arbitrary fees and charges made by Independence were much less than they were in fact;
- (c) That the Pennsylvania Company was "in back of" the plan and "guaranteed" \$2,000.00 at the end of ten years for each \$1,200.00 paid in; and
- (d) That the Pennsylvania Company was in sole and complete control of the "investment" of funds paid in by the planholders (R. 439-441).

Judge Kalodner further found that the recent sale of seven of the underlying securities, and the subsequent reinvestment of the proceeds, with its contingent fees, resulted in a loss to planholders of \$158,000.00, excluding the "overwrite" or "load" of \$38,258.85, or a total loss to planholders of approximately 25% of the amount they paid in. Finding that this "overwrite" or "load" was not only con-

cealed from planholders but was deliberately misterresented to them, he enjoined the payment by the Pennsylvania Company to, and the receipt by, Independence of the \$38,258.85.

In addition the learned Chancellor dismissed certain motions made by the respondents to dismiss the action; approved the addition of two parties plaintiff to the cause; and referred the question of solvency and insolvency to a special master (R. 453-460).

Respondents appealed from these orders of the District Court to the Circuit Court of Appeals for the Third Circuit challenging the jurisdiction of the District Court to entertain the instant cause of action and to enter the said orders (R. 462-466).

The Circuit Court on November 11, 1939, reversed the order of the District Court. It held that the United States District Court had jurisdiction of the instant cause of action by virtue of the Securities Act of 1933 but that the said Act did not authorize the application for the appointment of a receiver; that the present remedy of the petitioners is limited to a civil action at law to recover a money judgment for the consideration paid, although petitioners might later obtain injunctive relief in aid thereof; and that the injunction against the Pennsylvania Company may not be maintained since it is not a proper party to the suit (R. 475-480). Petitioners filed a petition for rehearing (R. 483-492) which the Circuit Court denied on December 20, 1939 (R. 495-496).

Reasons for Allowance of Writs.

The grounds relied upon by petitioners for the allowance of the writs are:

1. The decision of the Circuit Court is in conflict with decisions of the Supreme Court and other Circuit Courts, as follows:

Case v. Beauregard, 101 U.S. 688 (1879);

Wyman v. Wallace, 201 U.S. 230 (1906);

Filer v. Louisville & Nashville Railway Co., 213 U. S. 175 (1909);

Purey & Jones Co. v. Hanssen, 261 U. S. 491 (1923);

U. S. Navigation Co., Inc., v. Cunard Steamship Co., 284 U. S. 474 (1932);

*Merchants' National Bank et al. v. Chattanooga Construction Co., 53 Fed. 314 (C. C. E. D. Tenn. S. D., 1892);

Cook v. Flagg, 233 Fed. 426 (C. C. A. 2d, 1916).

- 2. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment.
- 3. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder.
- 4s Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed.
- 5. The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act does not authorize injunctive relief, it later indicates that the Securities Act does authorize injunctive relief.

Prayer.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this

Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket March Term, 1939, No. 7146. Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba and Eckley B. Coxe, 3d, appellants, v. Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin and J. S. Van Sciver, appellees; and March Term, 1939, No. 7147, The Pennsylvania Company for Insurance on Lives and Granting Annuities, appellant, Robert J. Deckert, Roland W. Randal, David W. Compton, R. G. Cadman, James L. Gleason, Samuel Miller, Irene R. Randal, Joseph Laky, Abe Zubrow, James H. Irvin and J. S. Van Sciver, appellees; and that the decrees of the Circuit Court for the Third Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

HARRY SHAPIRO, Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1939

No. 733

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, Jr., ET AL.

No. 734

ROBERT J. DECKERT, BOLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

228.

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

The Opinion of the Court.

The Circuit Court of Appeals filed an opinion by Biggs, P. J., on November 11, 1939, reversing an order of the District Court enjoining the payment by the Pennsylvania Company to, and the receipt by, Independence Shares Corporation of \$38,258.85, dismissing the action as to the Pennsylvania

sylvania Company and limiting the present remedy of your petitioners under the Securities Act of 1933 to a civil action at law to recover a money judgment although affirming jurisdiction in the District Court by virtue of the said Act.

Jurisdiction.

- 1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended, 28 U. S. C. Sect. 347 (a).
- 2. The decision of the Circuit Court of Appeals is in direct conflict with applicable decisions of your Honorable Court.
- 3. The date of the opinion of the Circuit Court of Appeals to be reviewed is November 11, 1939, and the date of the denial of the petition for rehearing is December 20, 1939.

Statement of Case.

The foregoing petition for writs of certiorari contains a concise statement of the case and, for the sake of brevity, said statement is not here repeated.

Specification of Error.

The Circuit Court of Appeals erred in reversing the orders of the Bistrict Court; in dismissing the action as to the Pennsylvania Company; and in holding that none of the prayers of the complaint asking for specific relief may be granted.

ARGUMENT.

I. Petitioners' Cause of Action.

Briefly stated, this is the plaintiffs' case:

Independence, its predecessor, Capital, and their officers, sold certain securities called "contract certificates" and

"purchase plans", to plaintiffs and other persons (hereinafter referred to as planholders) by means of certain fraudulent conduct, practices and misrepresentations forbidden by Section 12 of the Securities Act.

Section 12 provides that where securities have been sold by such fraud, the seller shall be liable to the buyer for the amount paid for such securities together with interest thereon. The Act further provides in Section 22(a) that "The District Court shall have jurisdiction • • of all suits in equity • • brought to enforce any liability or duty created by this [Act] • • " and in Section 16 that "The rights and remedies provided by this [Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity."

Since the stock selling scheme was fraudulent per se, all planholders are entitled, under the said Act, to bring suits in equity in the District Court to recover the money paid for the said securities with interest thereon.

The defendant vendor is, however, insolvent. Its assets are insufficient to satisfy the claims of all planholders. There is grave danger of waste and dissipation of these assets. Any recovery resulting from individual actions by planholders will constitute inequitable preferences to the prejudice of all other planholders. The situation requires the appointment of a receiver to make a proper accounting of the assets, liabilities and transactions of Independence, prevent threatened and probable multiplicity of suits, prevent dissipation and waste of assets equitably belonging to all planholders, safeguard and preserve the said assets, prevent inequitable preferences, bring suit against the wrongdoers, and distribute said assets equitably among all persons entitled thereto.

Plaintiff planholders, in compliance with the provisions of the Securities Act, and to enforce the liability created by that Act, commenced a class action for the appointment of a receiver to recover, liquidate and distribute, under the direction of the Court, the assets equitably belonging to planholders.

The contract certificates and purchase plans created trusts in certain underlying stock held by the Pennsylvania Company and purchased with the money paid in by planholders. Under the terms of the trust, the Pennsylvania Company, although named therein as trustee, is actually but a custodian of the assets and a bookkeeper of the transactions connected therewith; the real trustee is and was the defendant Independence: as stated by Judge Kalodner, "Independence Shares Corporation had and exercised sole control of the securities in the trust and the Pennsylvania Company had no control or authority whatsoever over the securities" (R. 453).

Since the contract certificates and purchase plans are voided by fraud, the trusts are necessarily likewise voided. The Pennsylvania Company is today, therefore, the holder of but naked legal title to certain assets equitably owned by the planholders. The Pennsylvania Company is, therefore, a necessary party defendant to the instant action so that the Court may direct it to turn these assets over to a representative of the Court.

Under the direction of the Court, therefore, the receiver will take into his possession these assets equitably belonging to planholders and held by the Pennsylvania Company and will distribute such assets to the planholders and will also proceed against Independence and such other persons as may be liable for the satisfaction of the rights given to planholders by the Securities Act and general equitable principles.

The Court will determine the several rights of all planholders; the receiver will distribute the assets to the planholders entitled thereto; and thus all planholders will be treated equally and equitably.

II. The Securities Act Authorizes Equitable Relief.

The Circuit Court held that the District Court had jurisdiction of the controversy by virtue of the provisions of Sections 12 (2) and 22 (a) of the Securities Act of 1933 (May 27, 1933, c. 38, Title 1, 48 Stat. 84 and 86 (15 U. S. C. A. 771. (2) & 77v (a)).

Section 12 (2) provides: "Any person who sells a security * * by the use of any means or instruments of transportation or communication in interstate com. merce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of pro f that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Section 22 (a) provides: "The District Courts of the United States * * shall have jurisdiction * * of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter * * ."

The Circuit Court decided that under the Securities Act the remedy of an aggrieved person lies exclusively in a "civil action" against the respondent vendor to recover the "consideration" paid by him, and therefore held that none of the prayers of the complaint asking for specific relief may be granted.

District Judge Kalodner, however, in holding that the Securities Act confers jurisdiction upon the District Court, pointed out that under Section 12 of the Act, the defendants are liable to the defrauded purchasers in the amount of the moneys paid in together with interest thereon (R. 433); that the Act not only provides that "District Courts shall have jurisdiction of all suits in equity brought to enforce any liability or duty created by this [Act]" (R. 432), but that "The rights and remedies provided by this [Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity" (R. 433).

It is respectfully submitted that the quoted language can only mean that the Act authorizes the institution of any kind of suit in equity and any form of known equitable procedure necessary or proper to enforce any liability or duty created by the Act. Here the liability to be enforced is the recovery of the moneys due planholders. The implement provided by equity and invoked here to enforce that liability is a class bill seeking the appointment of a receiver. Obviously such an action comes directly within the scope and meaning of the quoted language "suits in equity " brought to enforce any liability": see Guffanti v. National Surety Company, 196 New York 452 (1909); Cook v. Flagg, 237 Fed. 426, (C. C. A. 2d, 1916); Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371 (1893); Gordan, Secretary of Banking, v. Washington, 295 U.S. 30 (1935); City Bond & Finance, Inc., et al., v. Grant, 30 F. (2d) 671 (C. C. A. 8th, 1929).

Applicable here too is the well-settled doctrine that a court of equity which has assumed jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction to grant complete relief (Ward v. Todd, 103 U. S. 327 (1880); Ober v. Gallagher, 93 U. S. 199 (1876); Siler v. Louisville and Nashville Railroad Company, 213 U. S. 175 (1909); U. S. Navigation Co., Inc., v. Cunard S. S.

Co., 284 U. S. 474 (1932); Hart Coal Corp. et al. v. Sparks, 9 F. Supp. 825 (D. C. W. D. Ky., 1935)), to avoid multiplicity of suits (U. S. v. Union Pacific Railway, 160 U. S. 1, 50 (1895)), and to do entire justice with respect to the subject matter of the controversy (De Bemer v. Drew, 57 Barb. (N. Y.) 438 (1870)), whether the question is one of substance or remedy (Gwinn v. Lee, 6 Pa. Super. 646 (1897); McGowin v. Remington, 12 Pa. 56 (1849)).

Since the defendant vendor is insolvent and unable to satisfy in full the claims of planholders, it is submitted that the instant procedure is the only just and equitable method of determining and enforcing the rights of all planholders without preference or discrimination.

It follows also that since the contract certificates and purchase plans are void because of fraud, the trusts created thereby are also void. Only the Court can take possession of the assets of the now avoided trusts for liquidation and distribution to persons properly entitled thereto (Opinion of Kalodner, J., R. 439; Trusts Restatement, Section 199, Chapter 7).

As alleged in Paragraph 54 of the complaint, the prayer for the appointment of a receiver is proper, and the granting of such relief necessary, for the following reasons (R. 35):

- (a) Independence Shares Corporation is insolvent and unable to meet its liabilities.
- (b) A proper accounting can be undertaken only by a receiver appointed by the Court and not by agents and accountants dominated by the defendants.
- (c) The appointment of a receiver will prevent the threatened and probable multiplicity of suits.
- (d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets equitably belong-

ing to planholders and will preserve and safeguard the said assets.

- (e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of further litigation.
- (f) The liquidation and equitable distribution of the assets belonging to planholders should be undertaken only by an officer or representative of the Court.

It is, therefore, respectfully submitted that not only is a class bill for the appointment of a receiver authorized and intended by the Securities Act, but that it is the most appropriate form of equitable procedure applicable to the factual pattern of the instant cause.

Further, Section 12 of the Act is but a statutory type of equitable rescission of a contract; and, in all such cases, equity grants both rescission of the contract and, incidental to the equitable relief, the return of the money involved. Equity thus grants a money decree. As stated in *Davis* v. Rosenzweig Realty Operating Co., 192 N. Y. 128, 133 (1908):

"The general rule governing the subject is well set forth in 24 Am. & Eng. Encyc. of Law (2d ed.) 615 as follows: 'Where the complainant in equity seeks to have a contract totally rescinded or declared void for fraud, the fact that he seeks also a recovery of the money is not sufficient ground for the refusal of the court to entertain jurisdiction; for in an action at law, the recovery of money is the principal object, while in a suit in equity the rescission of the contract is the principal matter of relief and the recovery of money is merely incidental although a necessary consequence; hence, the court being properly in possession of the cause for the purpose of granting purely equitable relief, will proceed to do complete justice between the parties, although a part of the relief granted is purely legal in its nature

"The plaintiff in this action (brought) an action in equity to rescind and when rescission was decreed, he became entitled to full relief which included as an incident to rescission the recovery of the amount paid on the execution of the contract."

The Act specifically provides for suits both at law or in equity. It is highly probable that the Congress sought to provide the victim of fraud with every available judicial procedure for obtaining redress for his injury. Certainly, the Act should not be interpreted away to aid a fraudulent vendor, nor should the fact that money recovery may be the ultimate purpose of the suit defeat the victim's right to the aid of a court of equity. For example, if a debtor is insolvent and indulging in dissipation and waste, if equitable jurisdiction is present, equity will take jurisdiction and apply its immunizing powers to the assets of the debtor not-withstanding the fact that in essence the creditors are merely money claimants who are seeking the highest possible monetary return on their claim. The principle involved is just as applicable in the instant case.

Section 12 of the Securities Act should therefore be construed to permit a defrauded purchaser to recover his money, and for that purpose, to permit the utilization of all the powers of a court of equity, whenever they become necessary, to safeguard the victim's interests. Such a construction, in fact, appears to be the only rational explanation for the insertion of the clause "all suits in equity and actions at law" and would most effectively help defrauded victims and discourage violations of the Act.

In Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 (1923), it was said:

"• the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right. It is a means of preserving property which ultimately may be applied toward the satisfaction of substantive rights."

In Case v. Beauregard, 101 U. S. 688, 690 (1879), Mr. Justice Strong said:

"But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. " " Whenever a creditor has a trust in his favor " " he may go into equity without exhausting legal processes or remedies."

In the case of Cook v. Flagg, 233 Fed. 426 (C. C. A. 2d. 1916), the defendant Flagg, not a member of the Stock-Exchange, devised a fraudulent scheme for speculating in stock. On the faith of his representations, the plaintiff and many others entrusted him with their money to the extent of an estimated aggregate of \$1,100,000.00. complaint prayed for a preliminary injunction the appointment of a receiver, an ascertainment of the claims to the fund remaining in the defendant's hands, and an appropriate distribution. In appointing a receiver, the Court held that the defendant had acquired possession of the money of others through misrepresentations and that he was therefore a trustee ex maleficio and that the appointment of a receiver was the proper remedy. Inasmuch as participation in the fund was to be shared by many people similarly situated, a receiver was necessary in order to effectuate a just distribution.

See also Wyman v. Wallace, 135 Fed. 286 (1906), affirmed 201 U. S. 230; Merchants' National Bank et al. v. Chattanooga Construction Co., 53 Fed. 314, 317 (C. C. E. D. Tenn., 1892); Gordon, Secretary of Banking, v. Washington, 295 U. S. 30 (1935); III Scott on Trusts, Section 468; II Clark on Receivers, Section 1007.

III. The Opinion of the Circuit Court is Inconsistent in That Although First Holding That the Securities Act Does Not Authorize Injunctive Relief, it Later Indicates That the Securities Act Does Authorize Injunctive Relief.

Although the Circuit Court denied the injunctive relief here sought, the opinion, in a later part, says "The question of whether the appellees, upon a proper showing, might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12 (2) of the Act, is not before us, and therefore we do not pass upon it" (R. 480).

Petitioners submit they are unable to distinguish between the form of injunctive relief to which they may be entitled in aid of the remedies supplied by the Act from the injunctive relief presently refused. In short, the Circuit Court in the same opinion states that the petitions both are and are not entitled to injunctive relief.

An inconsistency which confuses, delays and renders uncertain the rights and remedies of 20,000 defrauded planholders is such a departure "from the accepted and usual course of judicial proceedings * * as to call for an exercise of this Court's power of supervision" (Supreme Court Rule 38 (5b)).

IV. The Pennsylvania Company is a Proper Party Defendant.

The Circuit Court held that, since the recovery of petitioners is limited to a money judgment, it follows that the Pennsylvania Company was not a proper party to the suit (R. 478-479).

Neither the Pennsylvania Company nor the other respondents nor the Circuit Court challenge, dispute or deny the findings of the learned District Court that the contract cerificates and purchase plans which created the trust of

which the Pennsylvania Company claims to be trustee, were induced and procured by flagrant fraud on the part of Independence Shares Corporation, its predecessor Capital Savings Plan, Inc., and their officers.

The money paid by defrauded planholders and securities purchased therewith constitute the corpus of the trust fund. The Pennsylvania Company claims the Court is powerless to protect this fund for these victims simply because it, the trustee, alleges it has not been guilty of any fraud or wrongdoing.

If the Circuit Court is correct in holding that the Pennsylvania Company is not a proper party to this suit, it means that the law is powerless to reach a trust estate procured and created by fraud.

Naturally, the law is otherwise. Nothing is more settled in the law than the principle that what fraud creates, equity will destroy. Bogert, in Trust & Trustee, Section 992, says, "If the trust declaration or transfer is procured by a wrongful act of the trustee, cestui que trust or third party, the settlor, or his successors in interest, may have it set aside in equity."

In Migely v. Migely, 162 Ill. App. 300 (1911), it is said "Chancery will take jurisdiction to set aside a trust agreement, the execution of which was induced by fraudulent representations."

In 65 Corpus Juris, page 332, it is said "an instrument purporting to create a trust is voided when its execution is procured by fraud, and it may be set aside", and on page 337, "where the execution of a trust is procured by fraud, equity may set it aside."

See Ricks' Appeal, 105 Pa. 528 (1884); Note, 38 A. L. R. 977; Gill v. Gill, 124 S. W. 875 (1910).

It follows, therefore, that participation in the fraud by the trustee is immaterial.

In addition, the Pennsylvania Company, under the trust agreements, is in reality not a trustee but simply a custodian and bookkeeper. It has neither the powers nor the obligations of a trustee concerning the corpus of the trust. All control, management, investment and reinvestment of the corpus is specifically vested in Independence Shares Corporation (Opinion of Kalodner, J., R. 446). Really the Pennsylvania Company's only function is to keep the funds and the records. In fact, throughout the trust agreement, the Pennsylvania Company zealously guards itself against any responsibility or liability by reason of the control or management of the trust. In addition, under the trust agreements, Independence Shares Corporation reserves the right at any time, for any reason, to discharge the Pennsylvania Company as so-called trustee and appoint a substitute trustee.

Hence the Pennsylvania Company's argument that the trust can not be avoided because it claims that it, as trustee, was not guilty of fraud, is not applicable here because the fact is that the real trustee is not the Pennsylvania Company, but Independence, who admittedly is guilty of fraud.

V. The Order Safeguarding the \$38,258.85 Was Proper.

It should be specifically noted that this order was not a preliminary injunction, but was rather an order entered during the process of litigation for the preservation and protection of property in litigation and rights therein.

Since Judge Kalodner found that the charges which this sum represents were not only concealed from planholders, but were deliberately misrepresented to them, the fund belongs to planholders and must be protected from dissipation by Independence. Such an order is reversible only for abuse of discretion: Kings and County Raisin Company v. Seeded Raisin Company, 182 Fed. 59 (C. C. A. 9th, 1910); Mineral Separation Company v. Miami Copper Company,

269 Fed. 265 (C. C. A. 3d, 1920); and since Independence neither challenges, disputes nor denies the facts on the basis of which the learned Chancellor extered the said order enjoining the receipt by it of the \$38,258.85, the order is proper; the learned Chancellor abused no discretion in making it; and it should be sustained irrespective of the question whether the Pennsylvania Company is or is not a proper party defendant.

VI. Respondents' Appeal to the Circuit Court Was Premature and Should Have Been Dismissed.

Defendants appealed from the orders of the learned Chancellor (1) referring the matter to a Special Master, (2) adding two additional parties plaintiff, (3) denying the motion of the appellants to dismiss the action, and (4) restraining the payment and receipt of \$38,258.85, representing certain charges made in connection with the re-investment of profits realized from the liquidation of, and semi-annual income from, seven of the underlying securities of Independence Trust Shares. It is submitted that the orders are interlocutory, not appealable, and that the appeals are therefore premature.

The cases holding that the said orders are interlocutory and appeals therefrom premature are as follows:

- (1) The reference of the question of solvency to a Special Master: Simkins Fed. Pract., 3rd Ed., Sect. 772, page 551; Perkins v. Fourniquet, et al., 6 Howard (U. S.) 206; Dodge Manufacturing Company, et al. v. Patten, 43 F. (2d) 472; Satterlee, et al. v. Harris, 60 F. (2d) 940 (1932).
- (2) The order adding two parties plaintiff: Rule 15 (a) of the Rules of Civil Procedure for the District Court of the United States; Bostwick v. Brinkerhoff, 106 U. S. 3 (1882); Werner v. Zintmaster, 77 F. (2d) 74 (C. C. A. 3d,

- 1935); Pioneer Grain Corp. v. Chicago Railway Co., 42 F.(2d) 1009 (C. C. A. 8th, 1930).
- (3) The dismissal of the motions of the defendants to dismiss the action: Miller v. Pyrites Co., Inc., 71 F. (2d) 804 (C. C. A. 4th, 1934); Cox v. Graves, Knight & Graves, Inc., 55 F. (2d) 217 (C. C. A. 4th, 1932); Rodriguez v. Arosemena, 91 F. (2d) 219 (C. C. A. 5th, 1937); Satterlee, et al., v. Harris, 60 F. (2d) 472 (C. C. A. 10th, 1932).
- (4) The order concerning the payment and receipt of the \$38,258.85: This order is not, as contended by appellants, a preliminary injunction from which an appeal may be taken, but is rather an order entered during the process of litigation for the preservation and protection of property in litigation and rights therein, from which no appeal may be taken.

Appeals are entirely creatures of statute. An appeal not authorized by any statute is necessarily void. The Judicial Code, Section 129, as amended (March 3, 1891, c. 517, Section 7, 26 Stat. 828, 28 U. S. C. Section 227) provides for appeals from injunctions granted in interlocutory decrees. Since the order restraining payment of the \$38,258.85 is not an injunction within the meaning of the statute but is rather an order entered for the protection of property during the process of litigation, the appeal therefrom is not authorized by the statute, and is therefore void.

As stated in Simkins Fed. Practice, supra, under the heading "Injunctions and Receivers—Interlocutory Orders":

"It is necessary, at various stages of a civil action, to take orders in furtherance of its preparation for final hearing, or for the preservation and protection of property in litigation, or rights therein, as heretofore shown. All such orders are called interlocutory orders, and are limited as to time, on their faces sometimes, or by law,

as in the case of injunctions, or they may continue in

force until the final hearing.

"As said, they may be granted at any time during the progress of the cause, either in term time or vacation, on motion days or such time as the court may appoint for hearing, when not grantable of course. All interlocutory decrees remain under the direction of the court, to be set aside by proper application at any time, and no appeal lies therefrom, unless, and to the extent, granted by the statute."

In any event the law is clear that:

"The granting of an interlocutory order rests in the sound discretion of the court below and a review thereof by an appellate court is limited to the inquiry whether there is an abuse of discretion in granting the order. This rule is based upon the consideration that the object and purpose of the preliminary order is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined": Kings and County Raisin and Fruit Co. v. U. S. Con. Seeded Raisin Co., 182 Fed. 59 (1910).

See also: Gulf Refining Co. v. Vincent Oil Co., 185

Fed. 87 (C. C. A. 5th, 1911):

All of which is respectfully submitted.

Harry Shapiro, Counsel for Petitioners.

Dated February 9, 1940.

Address of Counsel: 1800 Market Street National Bank Building, Juniper and Market Streets, Philadelphia, Pa.

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SUPREME COURT OF THE UNITED STATES-OCTOBER TERM, 1940 CHARLES ELMORE

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No. 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

INDEPENDENCE SHARES CORPORATION, ALFRED

H. GEARY, FRANK McCOWN, Jr., et al.

No. 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners.

vs.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

WILLIAM B. RUDENKO,
HARRY SHAPIRO,
Market Street National Bank Building,
Philadelphia, Pa.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1940

No. 17

ROBERT J. DECKERT, BOLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

47.9

Petitioners,

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., ET AL.

No. 18

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.

91.9

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinions of the courts below are reported in Deckert, et al., v. Independence Shares Corporation, et al., 27 F. Supp. 763 (D. C. E. D. Pa., 1939); Independence Shares Corporation, et al., v. Deckert, et al.; The Pennsylvania

Company for Insurances on Lives and Granting Annuities, et al., v. Deckert, et al., 108 F. (2d) 51 (C. C. A. 3rd, 1939).

Jurisdiction.

The date of the opinion of the Circuit Court of Appeals for the Third Circuit to be reviewed is November 11, 1939, and the date of the denial by the Circuit Court of appellants' petition for rehearing is December 20, 1939. The petition for writs of certiorari was filed on February 17, 1940, as of October Term, 1939, Nos. 733, 734, and was granted on March 25, 1940, as of October Term, 1940, Nos. 17, 18.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828, as amended; 28 J. S. C. 347 (a)).

Questions Presented.

1. Where an investment trust stock-selling scheme is fraudulent per se, and the vendor of said stock is insolvent, and the assets of said trust are being wasted and dissipated, and a multiplicity of suits by defrauded purchasers, with consequent inequitable preferences, is threatened and probable, does a district court of the United States, by virtue of the provisions of the Securities Act and the Judicial Code, have equitable jurisdiction over a class action brought by defrauded purchasers for the rescission of the sales of said securities, the revocation of the trusts in the underlying assets, the recovery of the consideration paid for said securities, and the appointment of a receiver to make an accounting of the assets, liabilities and transactions of the vendor, to bring suit against the wrongdoers, and to recover, liquidate and distribute the trust assets equitably among all persons entitled thereto?

- 2. In such a case, where the trust assets are held by a bank as nominal trustee thereof, and the bank in reality is but a custodian and bookkeeper, and all control, management, investment and reinvestment of the said assets are specifically vested in said vendor, and said class action prays that the bank be directed to turn over said assets to said receiver and that it be enjoined from paying over to said vendor any monies or assets belonging to purchasers, is said bank a necessary party defendant in said action?
- 3. In such a case, may the district court, pending litigation, enjoin the payment by the bank to, and the receipt by, said fraudulent insolvent vendor of a large sum of money belonging to purchasers?

Statutes Involved.

The statutes involved herein are Section 24 of the Judicial Code, as amended (March 3, 1875, c. 137, Sec. 1, 18 Stat. 470, 28 U. S. C. 41) and the Securities Act of 1933, as amended (May 27, 1933, c. 38, Title I, 48 Stat. 74 as amended; 15 U. S. C. 77a-z).

Statement of Case.

On March 11, 1939, plaintiff planholders filed a class action under the general equitable jurisdiction granted by the Judicial Code and Securities Act in the United States District Court for the Eastern District of Pennsylvania against the defendants: Independence Shares Corporation, a trust and investment corporation (hereinafter referred to as "Independence"); Alfred H. Geary, Frank McCown, Jr., Robert E. Bonner, Horace M. Barba, and Eckley B. Coxe, 3d, officers and directors of Independence; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, a bank (hereinafter referred to as "Pennsylvania Company").

The complaint alleges that:

- (a) Independence and its predecessor, Capital Savings Plan, Inc. (hereinafter referred to as "Capital"), in the sale of savings plan contract certificates, trust shares, and purchase plans, to the plaintiffs and many others, by the use and means of instruments of transportation and communication in interstate commerce and by the use of the mails, had defrauded them of both money and property, by means of untrue statements, misrepresentations and concealments, in violation of the Securities Act;
- (b) The Pennsylvania Company, as trustee, collected the payments from planholders, made certain deductions therefrom, and invested the balances, under the instructions of Independence, in Independence Trust Shares for the accounts of the respective planholders. These trust shares were created by Independence and represented a 1/1000 interest in a portfolio consisting of one share of each of certain underlying stocks purchased by Independence for the creation of the said trust shares;
- (c) A concealed, arbitrary "overwrite" or "load" was added to the price of the trust shares;
- (d) Independence and its predecessor, Capital, consented to an injunction restraining their further violation of the Securities Act, pursuant to the prayers of a Bill in Equity filed against them by the Securities and Exchange Commission on June 22, 1938, charging violation of the said Act;
- (e) Independence thereafter recognized and admitted a contingent liability, estimated by it to approximate \$3,500,000.00, arising out of the sales alleged herein to have been made in violation of the Securities Act;
- (f) There has been adverse publicity causing a virtual cessation of business and sales of contract certificates and

purchase plans, although expenses, overhead and excessive fees continue, making impossible any profit to subscribers; and

(g) Independence is insolvent, and its funds and assets, and the trust assets held by the Pennsylvania Company, all of which are controlled by Independence, are being dissipated and wasted;

and prays that:

(a) A receiver be appointed for the defendant Independence with power to take into his possession all of its assets and all of the trust assets held by the Pennsylvania Company, and to liquidate and distribute the said assets among the persons entitled thereto (R. 4-33).

After the suit was instituted but before an answer was filed, two additional planholders, J. S. Van Sciver and James H. Irvin, each of whom had paid in, and were therefore entitled to receive more than, \$3,000.00, were added as party plaintiffs by leave of court (R. 366).

After numerous hearings, District Judge Kalodner, on May 18, 1939, filed an opinion holding that the District Court had jurisdiction over this cause of action; that the "testimony overwhelmingly substantiated the allegations in the Bill of Complaint"; and that Independence was liable to subscribers for the money paid in by them (R. 336-363).

Specifically, the learned Chancellor found that many fraudulent and untrue statements and representations were made to planholders and prospective planholders by the defendant vendor, its officers and salesmen; that the defendant vendor and its officers gave written and verbal instructions to salesmen which directed them to use these fraudulent and untrue statements and representations; and that included in such fraudulent and untrue statements, representations, and concealments were the following:

- (a) That the plan was a "savings plan" paying a high rate of interest:
- (b) That the various arbitrary fees and charges made by Independence were much less than they were in fact;
- (c) That the Pennsylvania Company was "in back of" the plan and "guaranteed" \$2,000.00 at the end of ten years for each \$1,200.00 paid in; and
- (d) That the Pennsylvania Company was in sole and complete control of the "investment" of funds paid in by the planholders (R. 351-353).

Judge Kalodner further found that the allegations of dissipation of assets were substantiated by proof that the recent sale of seven of the underlying securities, and the subsequent reinvestment of the proceeds, with its contingent fees, resulted in a loss to planholders of \$158,000.00, excluding the "overwrite" or "load" of \$38,258.85, or a total loss to planholders of approximately 25% of the amount they paid in. Finding that this "overwrite" or "load" was not only concealed from planholders but was deliberately misrepresented to them, he enjoined the payment by the Pennsylvania Company to, and the receipt by, Independence of the \$38,258.85 (R. 368). In addition, Judge Kalodner dismissed the motions to dismiss the action and referred the question of solvency or insolvency to a special, master (R. 363).

Without challenging, denying or disputing the findings of the District Court, the defendants appealed from these orders to the Circuit Court of Appeals for the Third Circuit. Independence argued that the court lacked jurisdiction to entertain the cause and to enter the said orders. The Pennsylvania Company argued that since the Securities Act only authorized the recovery of a money judgment against the vendor, the Pennsylvania Company was not a proper

party defendant. The Pennsylvania Company also argued that since it, the trustee, was not charged with any fraud or wrongdoing, the court was powerless to reach or protect the trust res in its hands, even though the trust res had been procured by a stock selling scheme fraudulent per se.

The Circuit Court, on November 11, 1939, reversed the orders of the District Court. It agreed with the District Court that jurisdiction of the intant cause existed in the District Court by virtue of the povisions of the Securities Act; but without commenting upon or apparently considering the equities arising from the proved facts, or the equitable jurisdiction granted by the Judicial Code, or inherent in the District Court held that the Securities Act did not authorize the appointment of a receiver; that the present remedy of the plaintiffs is limited to a "civil action" at law to recover a money judgment against the vendor for the consideration paid that the injunction against the Pennsylvania Company may, therefore, not be maintained; and dismissed the action as to the Pennsylvania Company (R. 380-385). Plaintiffs filed a petition for rehearing which the Circuit Court denied on December 20, 1939 (R. 391-392).

On February 17, 1940, appellants filed, and on March 25, 1940, this Court granted, a petition for writs of certiorari to the Circuit Court (R. 393).

Specifications of Errors to be Urged.

- 1. The Circuit Court erred in reversing the orders of the District Court.
- 2. The Circuit Court erred in dismissing this action as to the Pennsylvania Company.
- 3. The Circuit Court erred in holding that none of the prayers of the complaint asking for specific relief may be granted.

- 4. The Circuit Court erred in not holding that the District Court had equitable jurisdiction, under both the Judicial Code and the Securities Act, to hear and determine this cause and to grant the relief prayed for.
- 5. The Circuit Court erred in holding that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a "civil action" at law for the recovery of a money judgment against the vendor.
- 6. The Circuit Court erred in holding that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder.

ARGUMENT.

I. Summary of Argument.

Briefly stated, this is the plaintiffs' case:

Independence, its predecessor, Capital, and their officers, sold certain securities called "contract certificates" and "purchase plans", to plaintiffs and other persons (hereinafter referred to as planholders) by means of certain fraudulent conduct, practices and misrepresentations forbidden by Section 12 of the Securities Act.

Section 12 provides that where securities have been sold by such fraud, the seller shall be liable to the buyer, "who may sue either at law or in equity, in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon."

The Act further provides in Section 22 (a) that "the District Court shall have jurisdiction . . . of all suits in equity . . . brought to enforce any liability or duty created by this [Act] . . ." and in Section 16 that "the

rights and remedies provided by this [Aet] shall be in addition to any and all other rights and remedies that may exist at law or in equity."

Section 24 (1) (a) of the Judicial Code provides that "the district courts shall have original jurisdiction . . . of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00 and . . . arises under the Constitution or laws of the United States . . ." Section 24 (8) provides that "the district courts shall have original jurisdiction . . . of all suits and proceedings arising under any law regulating commerce . . ."

Since the stock selling scheme was fraudulent per se, all planholders are entitled, under the quoted provisions of the Securities Act and the Judicial Code, to bring suits in equity in a district court to rescind sales of certificates, avoid the trusts created therein, and recover the money paid for the said securities with interest thereon.

The defendant vendor is, however, insolvent. Its assets are insufficient to satisfy the claims of all planholders. There is grave danger of continued waste and dissipation of these assets. Any recovery resulting from individual actions by planholders will constitute inequitable preferences to the prejudice of all other planholders. There being no adequate remedy at law, the situation requires the appointment of a receiver to make a proper accounting of the assets, liabilities and transactions of Independence, prevent threatened and probable multiplicity of suits, prevent dissipation and waste of assets equitably belonging to all planholders, safeguard and preserve the said assets, prevent inequitable preferences, bring suit against the wrongdoers, and distribute said assets equitably among all persons entitled thereto.

8:

Plaintiff planholders, in compliance with the provisions of the Securities Act and Judicial Code, and to enforce the liability created by the Securities Act, commenced a class action for the appointment of a receiver to recover, liquidate and distribute, under the direction of the court, the assets equitably belonging to planholders.

The contract certificates and purchase plans created trusts in certain underlying stock held by the Pennsylvania Company and purchased with the money paid in by planholders. Under the terms of the trust, the Pennsylvania Company, although named therein as trustee, is actually but a custodian of the assets and a bookkeeper of the transactions connected therewith; the real trustee is and was the defendant Independence: as stated by Judge Kalodner, "Independence Shares Corporation had and exercised sole control of the securities in the trust and the Pennsylvania Company had no control or authority whatsoever over the securities" (R. 361)...

Since the contract certificates and purchase plans are voided by fraud, the trusts are necessarily likewise voided. The Pennsylvania Company is today, therefore, the holder of but naked legal title to certain assets equitably owned by the planholders. The Pennsylvania Company is, therefore, a necessary party defendant to the instant action so that the court may direct it to turn these assets over to a representative of the court.

Under the direction of the court, therefore, the receiver will take into his possession these assets equitably belonging to planholders and held by the Pennsylvania Company and will distribute such assets to the planholders and will also proceed against Independence and such other persons as may be liable for the satisfaction of the rights given to planholders by the Securities Act and general equitable principles.

The court will determine the several rights of all planholders; the receiver will distribute the assets to the planholders entitled thereto; and thus all planholders will be treated equally and equitably.

II. Jurisdiction Exists Under Both the Judicial Code and the Securities Act.

The Circuit Court held that the District Court had jurisdiction over the controversy but restricted the jurisdiction to that granted under the provisions of Sections 12(2) and 22(a) of the Securities Act. The court decided, moreover, that under the Act the remedy/of an aggrieved person lies exclusively in a "civil action" against the respondent vendor to recover the "consideration" paid by him, and therefore held that none of the prayers of the complaint asking for specific relief may be granted.

It is contended by plaintiffs that jurisdiction arises and exists by virtue of both the Judicial Code and the Securities Act and that both authorize the equitable relief here sought.

(a) JURISDICTION UNDER THE JUDICIAL CODE,

Jurisdiction exists over the instant cause of action in the United States District Court by virtue of the provisions of Section 24 of the Judicial Code which provides, inter alia:

"The District Courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00 and (a) arises under the Constitution or laws of the United States

"The foregoing provisions as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding para-

graphs of this section

"Eighth. Of all suits and proceedings arising under any law regulating commerce . . ."

It appears, therefore, that jurisdiction exists in the United States District Court (1) if the matter in controversy exceeds the sum of \$3,000.00 and arises under the laws of the United States, or (2) if the suit arises under a law regulating commerce.

(1) The matter in controversy exceeds \$3,000.00 since two of the plaintiffs, to wit, J. S. Van Sciver and James H. Irvin, have each paid in and therefore are entitled to receive more than \$3,000.00 (R. 366). Further, it is well settled in the United States District Court for the Eastern District of Pennsylvania, where the instant suit was brought, that where a bill seeks the appointment of a receiver, the amount involved, for jurisdictional purposes, is not the amount of the plaintiffs' claims but the value of the receivership assets: United States Radiator Company, et al. v. Doody, et al., 5 F. Supp. 471 (D. C. E. D. Pa., 1933); Great Atlantic and Pacific Tea Co. v. A. and P. Cleaners and Dyers, Inc., 10 F. Supp. 450 (D. C. W. D. Pa., 1935). Accord: Gibson v. Shufeldt, 122 U.S. 27 (1887); Handley v. Stutz, 137 U. S. 366 (1890); Towle v. American Building, Loan & Investment Society, 60 F. 131 (C. C., N. D. Ill., 1894); Taylor v. Decatur Mineral & Land Company, 112 Fl. 449 (C. C. N. D. Ala., 1901).

Since this suit arises under a law of the United States, to wit, the Securities Act, and the matter in controversy exceeds the sum of \$3,000.00, it follows that the District Court has jurisdiction by virtue of Section 24 (1) (a) of the Judicial Code.

(2) The suit arises under a law regulating commerce, to wit, the Securities Act. The Circuit Court concedes this, holding that the Securities Act "stems from the exercise of

Federal power under the commerce clause" (R. 383). Since the Securities Act is a law regulating commerce, it follows that the District Court has jurisdiction under Section 24 (8) of the Judicial Code.

For example, in a suit to restrain penalty deductions under the A. A. A., Mr. Justice Roberts said:

"Tho' no diversity of citizenship is alleged, nor is any amount in controversy asserted, . . . the case falls within subdiv. 8 (supra)." Mulford v. Smith, 307 U. S. 38, 46 (1939).

In Katz v. U. S. Shipping Board Emergency Fleet Corp., et al., 32 F. (2d) 14 (D.C. E. D. N. Y., 1929), the Federal court was held to have jurisdiction over an action for injuries to a visitor on a ship lawfully traversing a passageway on a pier, since the maintenance of wharves is a part of commerce and the action arose under a law regulating commerce. It was held that it was immaterial that the amount involved was only \$1,000.00.

If a suit arises under a law regulating commerce, Federal courts have original jurisdiction under Section 24 (8) of the Judicial Code regardless of the amount in controversy: Young & Jones v. Hiswatha Gin & Manufacturing Co., 17 F. (2d) 193 (D. C. Miss., 1927). The Court said, at p. 194:

"If plaintiffs' declaration reveals a clear and substantial suit or controversy over the validity, construction or effect of a law regulating commerce, which will be defeated or sustained according to the construction given such law, the suit arises under the law regulating commerce and is one of which Federal courts have original jurisdiction."

See also Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909); Binderup v. Pathe Exchange, Inc., et al., 263 U.S. 291 (1923); Atchison, T. & S. F. Railway Co. v. Kin-

kade, 203 F. 165 (D. C. Kansas, 1912); Illinois Central Railway Co. v. S. Segari & Co., 205 F. 998 (D. C. La., 1913).

(b) JURISDICTION UNDER THE SECURITIES ACT.

Section 12 (2) provides: "Any person who (2) sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untrath or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdietion, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security; or for damages if he no longer owns the security."

Section 22 (a) provides: "The District Courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter . . ."

Since the instant suit was brought, inter alia, to enforce the liability created by the Securities Act, the Circuit Court properly held that jurisdiction existed in the United States District Court.

(c) SUMMARY OF JURISDICTIONAL BASES.

It is contended, therefore, that there exists here three separate bases of jurisdiction, as follows:

- (1) Jurisdiction exists under Section 24 (1) (a) of the Judicial Code since there is present the jurisdictional amount of \$3,000.00 and the suit arises under a law of the United States, to wit, the Securities Act.
- (2) Jurisdiction exists under Section 24 (8) of the Judicial Code since the suit arises under a law regulating commerce, to wit, the Securities Act.
- (3) Jurisdiction exists under Sections 12 (2) and 22 (a) of the Securities Act since this suit is brought to enforce a liability created by that Act.

III. The Jurisdiction So Obtained Includes the Power to Grant the Equitable Remedies Sought.

Plaintiffs submit that the District Court had power to grant equitable relief in this cause under any one or all of the three said bases of jurisdiction.

(a) Equitable Power Under the Judicial Code.

The Judicial Code expressly authorizes suits in equity. Section 24 (1) (a) provides in part as follows: "The District Court shall have original jurisdiction as follows: First. Of all suits of a civil nature at common law or in equity ..."

Subdivision (8) of Section 24 provides: "Eighth. Of all suits and proceedings arising under any law regulating commerce."

The Judicial Code therefore authorizes this suit in equity; and the court had jurisdiction and power thereunder as a Federal court of equity, and independently of any additional powers granted by the Securities Act, to grant all appropriate equitable relief, including the appointment of a receiver.

In Gordon v. Washington, 295 U. S. 30, 36 (1935), speaking of "suits in equity" referred to in the Judicial Code, Mr. Justice Stone said:

The phrase has been understood to refer to suits in which relief is sought according to the principles applied by the English courts of chancery before 1789, as they have been developed in the Federal courts."

(b) EQUITABLE POWER UNDER THE SECURITIES, ACT.

Section 12 (2) of the Securities Act provides: "Any person who . . . (2) sells a security . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care, could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

• Section 22 (a) provides: "The District Courts of the United States . . . shall have jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter. . . ."

The Circuit Court decided that under the Securities Act the remedy of an aggrieved person lies exclusively in a "civil action" against the respondent vendor to recover the "consideration" paid by him, and therefore held that none of the prayers of the complaint asking for specific relief may be granted.

District Judge Kalodner, however, in holding that the Securities Act confers jurisdiction upon the District Court, pointed out that under Section 12 of the Act, the defendants are liable to the defrauded purchasers in the amount of the moneys paid in together with interest thereon (R. 433); that the Act not only provides that "District Courts shall have jurisdiction . . . of all suits in equity . . . brought to enforce any liability or duty created by

... brought to enforce any liability or duty created by this [Act]" (R. 432), but that Section 16 provides that:

"The rights and remedies provided by this [Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity" (R. 433).

It is respectfully submitted that the quoted language can only mean that the Act authorizes the institution of any kind of suit in equity and any form of known equitable procedure necessary or proper to enforce any liability or duty created by the Act. Here the liability to be enforced is the recovery of the moneys due planholders. The implement provided by equity and invoked here to enforce that liability is a class bill seeking the appointment of a receiver. Obviously, such an action comes directly within the scope and meaning of the quoted language "suits in equity . . . brought to enforce any liability": see Guffanti v. National Surety Company, 196 N. Y. 452 (1909); Cook v. Flagg, 237 F. 426 (C. C. A. 2d, 1916); Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371 (1893); Gordon, Secretary of Banking v. Washington, 295 U. S. 30 (1935); City Bond & Finance, Inc., et al. v. Grant, 30 F. (2d) 671 (C. C. A. 8th, 1929).

Further, Section 12 of the Act is but a statutory type of equitable rescission of a contract; and, in all such cases, equity grants both rescission of the contract and, incidental to the equitable relief, the return of the money involved. Equity thus grants a money decree. As stated in Davis Rosenzweig Realty Operating Co., 192 N. Y. 128, 133 (1908):

"The general rule governing the subject is well set forth in 24 Am. & Eng. Encyc. of Law (2d ed.) 615 as follows: 'Where the complainant in equity seeks to have a contract totally rescinded or declared void for fraud, the fact that he seeks also a recovery of the money is not sufficient ground for the refusal of the court to entertain jurisdiction; for in an action at law, the recovery of money is the principal object, while in a suit in equity the rescission of the contract is the principal matter of relief and the recovery of money is merely incidental although a necessary consequence; hence, the court being properly in possession of the cause for the purpose of granting purely equitable relief, will proceed to do complete justice between the parties, although a part of the relief granted is purely legal in its nature.

"The plaintiff in this action . . . [brought] an action in equity to rescind and when rescission was decreed, he became entitled to full relief which included as an incident to rescission the recovery of the amount

paid on the execution of the contract."

The Act specifically provides for suits both at law or in equity. It is highly probable that the Congress sought to provide the victim of fraud with every available judicial procedure for obtaining redress for his injury. Certainly, the Act should not be interpreted away to aid a fraudulent vendor, nor should the fact that money recovery may be the ultimate purpose of the suit defeat the victim's right to the aid of a court of equity. For example, if a debtor is insolvent and indulging in dissipation and waste, if equitable jurisdiction is present, equity will take jurisdiction and apply its immunizing powers to the assets of the debtor not-withstanding the fact that in essence the creditors are

merely money claimants who are seeking the highest possible monetary return on their claim. The principle involved is just as applicable in the instant case.

Section 12 of the Securities Act should therefore be construed to permit a defrauded purchaser to recover his money, and for that purpose, to permit the utilization of all the powers of a court of equity, whenever they become necessary, to safeguard the victim's interests. Such a construction, in fact, appears to be the only rational explanation for the insertion of the clause "all suits in equity and actions at law" and would most effectively help defrauded victims and discourage violations of the Act.

(c) Power to Appoint Receiver Not Dependent on Statute

It is well settled moreover that the power of the Federal courts to appoint receivers is inherent in Federal equity jurisdiction and does not depend on statute. As stated in Alderson's Beach on Receivers (1905) pages 71, 15, 16:

"The power of a court of equity to appoint a receiver in cases which come within those principles which make its duty inherent is exercised without the necessity for statutory authority and is in fact independent of statute. . . . The appointment of receivers having originated in the court of chancery in England . . . the power of appointment has naturally and regularly descended to all courts which have jurisdiction in equity. It is inherent in courts of equity. . . The courts of the United States retain and exercise all the chancery powers originally granted to them by the Process Act of 1792, by which the principles, rules and usages of the English court of chancery were adopted in proceedings in equity. Among these powers is that of appointing receivers, a function which is frequently exercised."

This Court said in Payne v. Hook, 7 Wall. 425, 430 (1868):

"The equity jurisdiction conferred on Federal courts is the same as the high court in chancery in England possesses . . ."

In 6 Cyc. of Federal Procedure (Langsdorff, 1929), Section 3329, it is said:

"If the Federal court has jurisdiction as a Federal court, the next question is as to its equity jurisdiction to appoint a receiver, and as to this it is held that its power is inherent.

As stated in Road Improvement District No. 7 v. Guardian Savings & Trust Co., 298 F. 272, 274 (C.C. A. 8th, 1924):

"The general power to appoint receivers, in proper cases and under proper circumstances, inheres in Federal equity jurisdiction."

In U. S. v. McCutcheon, 234 F. 702, 715 (D. C. of Cal., 1915) the court said:

"The appointment of a receiver is made by a court of equity in the performance of one of its prerogative functions.

In Tardy's Smith on Receivers (1920, p. 1, Section 1 it is said:

"The power to appoint receivers is one referable solely to the powers exercised by courts of chancery... the power to appoint a receiver pendente lite has been exercised by courts of chancery as incidental to their jurisdiction. It has not been deemed to depend upon statute."

See also I Clark on Receivers, pp. 50, 52; Decker v. Gardner, 121 N. Y. 334 (1891); In re Penny, 10 F. Supp. 638, 640 (D. C. N. C. 1935).

It is to be noted that the Circuit Court, in the instant case, based its holding that the District Court had no power to appoint a receiver in these proceedings upon the absence of any provision therefor in the Securities Act of 1933.

If the absence of such provision in the statute were sufficient ground for denying such power to a District Court, then no appointment of a receiver by a Federal court of equity is valid, for there is no Federal statute, except the bankruptcy laws, granting to a Federal court the power to appoint a receiver. We are concerned here, however, not with receivers in bankruptcy, but with equity receiverships.

Furthermore, the only provisions existing in the Federal statutes relative to equity receivers impliedly recognize the inherent power of the courts to appoint them. There are only four such provisions in the Federal statutes as follows (6 Cyc. of Federal Procedure (Langsdorff, 1929) Sec. 3315):

- (1) Management of receivership property by receivers in accordance with State laws (Judicial Code, Sec. 65; Act of March 3, 1887, c. 373, Sec. 2, 24 Stat. 554, as amended; 28 U. S. C. 124).
- (2) Control by receiver of property outside the district, but within the judicial circuit (Judicial Code, Sec. 56; Act of March 3, 1911, c. 231, Sec. 56, 36 Stat. 1102; 28 U. S. C. 117).
- (3) Leave of court to sue receiver (Judicial Code, Sec. 66; Act of March 3, 1887, c. 373, Sec. 3, 24 Stat. 554, as amended; 28 U. S. C. 125); and
- (4) Eligibility of particular officers to act as receivers (Judicial Code, Sec. 68; Act of March 3, 1879, c. 183, 20 Stat. 415, 28 U. S. C. Sec. 127; and Act of May 28, 1896, c. 252, Sec. 20, 29 Stat. 184, 28 U. S. C. Sec. 527).

Since the Federal courts have constantly and frequently, since their creation, appointed receivers in equity without objection: since there is no Federal statute granting such power to the Federal court: it follows a priori that the power is inherent in the courts themselves, and does not, and need not, flow from statute. It is most respectfully urged, therefore, that the Circuit Court erred in holding that plaintiffs were not entitled to the appointment of a receiver and that the Securities Act did not enlarge the rights of the plaintiffs to such appointment.

Moreover, it is well settled that where a plaintiff is granted a right of action by statute, he may, in order to implement and effectuate that right of action, demand and obtain ancillary equitable relief. Included in such ancillary equitable relief is the appointment of a receiver: Ireland v. Nichols, 3. N. Y. Super, 208 (1869); Roper Lumber Co. v. Wallace, 93 N. C. 22 (1885); People v. N. Y., 10 Abb. Pr. 111 (1858); Hickman v. City of Kansas, 120 Mo. 110 (1894).

(d) THE EQUITABLE REMEDIES SOUGHT ARE NECESSARY AND APPROPRIATE.

Plaintiffs may maintain the instant class action under Rule 23 (a) of the Federal Rules of Civil Procedure since the persons constituting the class are so numerous as to make it impracticable to bring them all before the court, the character of the rights sought to be enforced for the class is several, the object of the action is the adjudication of claims which affect specific property involved in the action, there are common questions of law and fact affecting the several rights, and a common relief is sought. Everglades Drainage League, et al. v. Broward Drainage District, et al., 253 F. 246 (D. C. Fla., 1918); Gramling v. Maxwell, 52 F. (2d) 256 (D. C. N. C., 1931).

A class suit has been defined in Seminole v. Southern, 182 F. 85, 96 (C. C. E. D. N. C., 1910) as follows: "One in which one or more members of a numerous class having a common interest sue in behalf of themselves and all other members of that class. Such suits are sometimes called 'creditors' suits' and sometimes 'stockholders' suits.'

The appointment of a receiver in a class action is common. As stated in 15 C. J. 1449:

"It is a well established practice to appoint a receiver of defendant's property in aid of a creditors' bill whenever it appears that the property is in peril or in danger of waste, especially"

See Shainwald v. Lewis, & F. 766 (D. C. Cal. 1881).

In Gramling v. Maxwell, supra, a suit was brought to enjoin the enforcement of a tax by the complainant on behalf of himself and others similarly situated, alleging that at least 400 other persons were in the same plight and condition that he was. The defendant argued that the taxing Act provided for the payment of the tax under protest and suit for its recovery and that, therefore, there was an adequate remedy at law. The court stated first that if merely a single taxpayer were involved this remedy at law would probably be adequate but since a multiplicity of suits was inevitable, a class suit was proper. The court said at p. 260:

"It is speedier, more efficacious and more satisfactory for all parties concerned than the institution of 100 or more actions at law for the recovery of taxes paid under protest. The remedy provided by the statute cannot, therefore, in view of the situation, be deemed an adequate remedy as compared with snit in equity which eliminated so much useless and cumbersome litigation."

Applicable here too is the well-settled doctrine that a court of equity which has assumed jurisdiction of a controversy on any ground or for any purpose will retain such

jurisdiction to grant complete relief (Ward v. Todd, 103 · U. S. 327 (1880); Ober v. Gallagher, 93 U. S. 199 (1876); Siler, et al. v. Louisville and Nashville Railroad Company, 213 U. S. 175 (1909); U. S. Navigation Co., Inc. v. Cunard S. S. Co., 284 U. S. 474 (1932); Hart Coal Corp., et al. v. Sparks, 9 F. Supp. 825 (D. C. W. D. Ky., 1935), to avoid multiplicity of suits (U. S. v. Union Pacific Railway Co., et al., 160 U. S. 1, 50 (1895)), and to do entire justice with respect to the subject matter of the controversy (De Bemer v. Drew, 57 Barb. (N. Y.) 438 (1870)), whether the question is one of substance or remedy (Gwinn v. Lee, 6 Pa. Super., 646 (1898); McGowin v. Remington, 12 Pa. 56 (1849)).

In the instant case, if all 20,000 planholders brought-individual suits against the defendants, seeking to rescind the trust, protect the trust res from dissipation and waste, and recover the consideration paid by them for the securities, each planholder separately would prove the same general and all-pervasive fraud which plaintiffs, on behalf of all, have already proved in this case. Equity must therefore take jurisdiction to avoid the threatened and probable multiplicity of suits and to do entire justice with respect to the subject matter of the controversy. Complete and final relief will thus be given 20,000 planholders by means of a single judicial decree.

Moreover, since the defendant vendor is insolvent and unable to satisfy in full the claims of planholders, it is futile to argue that the only proper remedy of a defrauded planholder is an action at law when it is probable that, by the time the judgment is obtained, execution thereon would be fruitless and of no practical utility. In addition, such course of procedure would create preferences in favor of those planholders who were fortunate enough to secure the first judgments. It is therefore submitted that the proce-

dure of the instant case is the only just and equitable method of determining and enforcing the rights of all planholders without preference or discrimination. See Case v. Beauregard, 101 U. S. 688 (1879).

Since the contract certificates and purchase plans are void because of fraud, the trusts created thereby are also void and, as stated in Case v. Beauregard, supra, at 691:

"Whenever a creditor has a trust in his favor . . . he may go into equity without exhausting legal processes or remedies."

See also Oelrichs v. Spain, 82 U. S. 211 (1872); Wyman v. Wallace, 135 F. 286, 292 (C. C. A. 8th, 1904).

What has been said above should effectually dispose of appellees' contention that there is an adequate remedy at law.

Since the trust assets are in danger of loss from waste, misconduct and the insolvency of the defendant vendor, the appointment of a receiver is proper: International Trust Company v. Decker Brothers, et al., 152 F. 78 (C. C. A. 9th, 1907).

The court, and only the court, can take possession of the assets of the now avoided trusts for liquidation and distribution to persons properly entitled thereto (opinion of Kalodner, J., R. 351, Trusts Restatements, Sec. 199, Chap. 7).

In Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 (1923), it was said:

". . . the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right. It is a means of preserving property which ultimately may be applied toward the satisfaction of substantive rights."

In Alderson's Beach on Receivers (1905), page 72, it is said:

"The primary purpose in all circumstances in which a receiver is appointed, is to protect and safeguard the property which is the subject matter of the litigation where there is no other adequate method of doing so in order that the work of the court in determining the litigation will not be an idle ceremony."

The appointment of a receiver here effectuates these purposes precisely; he would preserve the trust funds so that the rights of planholders may be ultimately satisfied out of their proceeds.

In Cook v. Flagg, 233 F. 426 (C. C. A. 2d, 1916), the defendant Flagg, not a member of the Stock Exchange, devised a fraudulent scheme for speculating in stock. On the faith of his representations, the plaintiff and many others entrusted him with their money to the extent of an estimated aggregate of \$1,000,000.00. The complaint prayed for a preliminary injunction, the appointment of a receiver, an ascertainment of the claims to the fund remaining in the defendant's hands, and an appropriate distribution. appointing a receiver, the Court held that the defendant had acquired possession of the money of others through misrepresentations and that he was therefore a trustee ex maleficio and that the appointment of a receiver was the proper remedy. Inasmuch as participation in the fund was to be shared by many people similarly situated, a receiver was necessary in order to effectuate a just distribution.

See also Wyman v. Wallace, 135 F. 286 (C. C. A. 8th, 1904), affirmed 201 U.S. 230 (1906); Merchants' National Bank, et al. v. Chattanooga Construction Co., 53 F. 314, 317 (C. C. E. D. Tenn., 1892); Gordon, Secretary of Banking v. Washington, 295 U.S. 30 (1935); III Scott on Trusts, Section 468; II Clark on Receivers, Section 1007.

As alleged in Paragraph 54 of the complaint, the prayer for the appointment of a receiver is proper, and the granting of such relief necessary, for the following reasons (R. 26, 27):

- (a) Independence Shares Corporation is insolvent and unable to meet its liabilities.
- (b) A proper accounting can be undertaken only by a receiver appointed by the Court and not by agents and accountants dominated by the defendants.
- (c) The appointment of a receiver will prevent the threatened and probable multiplicity of suits.
- (d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets equitably belonging to planholders and will preserve and safeguard the said assets.
- receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of further litigation.
- (f) The liquidation and equitable distribution of the assets belonging to planholders should be undertaken only by an officer or representative of the court.

It is, therefore, respectfully submitted that not only is a class bill for the appointment of a receiver authorized and intended by the Judicial Code, the Securities Act, and general equitable principles, but that it is the most appropriate form of equitable procedure applicable to the factual pattern of the instant cause.

IV. The Pennsylvania Company is a Necessary Party Defendant.

The Circuit Court held that, since the recovery of petitioners is limited to a money judgment, it follows that the Pennsylvania Company was not a proper party to the suit (R. 383-384).

Neither the Pennsylvania Company nor the other respondents nor the Circuit Court challenge, dispute or deny the findings of the learned District Court that the contract certificates, purchase plans and trust shares which created the trust fund of which the Pennsylvania Company claims to be trustee, were induced and procured by flagrant fraud on the part of Independence Shares Corporation, its predecessor Capital Savings Plan, Inc., and their officers.

The money paid by defrauded planholders and securities purchased therewith constitute the corpus of the trust fund. The Pennsylvania Company claims the Court is powerless to protect this fund for these victims simply because it, the trustee, alleges it has not been guilty of any fraud or wrongdoing.

If the Circuit Court is correct in holding that the Pennsylvania Company is not a proper party to this suit, it means that the law is powerless to reach a trust estate procured and created by fraud.

Naturally, the law is otherwise. Nothing is more settled in the law than the principle that what fraud creates, equity will destroy. Bogert, in Trust & Trustee, Section 992 says, "If the trust declaration or transfer is procured by a wrongful act of the trustee, cestui que trust or third party, the settlor, or his successors in interest, may have it set aside in equity."

In Migely v. Migely, 162 Ill. App. 300 (1911), it is said, "Chancery will take jurisdiction to set aside a trust agreement, the execution of which was induced by fraudulent representations."

In 65 Corpus Juris, page 332, it is said "an instrument purporting to create a trust is voided when its execution is procured by fraud, and it may be set aside", and on page 337, "where the execution of a trust is procured by fraud, equity may set it aside."

See Ricks' Appeal, 105 Pa. 528 (1884); Note, 38 A. L. R. 977; Gill's Trustee, et al., v. Gill, et al., 124 S. W. (Ky.) 875 (1910).

It follows, therefore, that participation in the fraud by the trustee is immaterial.

In addition, the Pennsylvania Company, under the trust agreements, is in reality not a trustee but simply a custodian and bookkeeper. It has neither the powers nor the obligations of a trustee concerning the corpus of the trust. All control, management, investment and reinvestment of the corpus is specifically vested in Independence Shares Corporation (Opinion of Kalodner, J., R. 359). Really, the Pennsylvania Company's only function is to keep the funds and the records. In fact, throughout the trust agreement, the Pennsylvania Company zealously guards itself against any responsibility or liability by reason of the control or management of the trust. In addition, under the trust agreements, Independence Shares Corporation reserves the right at any time, for any reason, to discharge the Pennsylvania Company as so-called trustee and appoint a substitute trustee.

Hence the Pennsylvania Company's argument that the trust can not be avoided because it claims that it, as trustee, was not guilty of fraud, is not applicable here because the fact is that the real trustee is not the Pennsylvania Company, but Independence, who admittedly is guilty of fraud.

It follows that if the trust is not terminated, the trust assets, even though nominally in the possession of the Pennsylvania Company, will actually be administered, managed and controlled by Independence, the insolvent perpetrator of the fraud.

At the inception of these proceedings, no charges were made against the Pennsylvania Company because plaintiffs deemed the making of such charges irrelevant and unnecessary. Since the Pennsylvania Company, however, contends that it is unnecessary for the Court to appoint a receiver because it is the proper person to retain and manage the trust corpus, it becomes necessary to review the conduct of the Pennsylvania Company.

It may be, of course, that the Pennsylvania Company even though it had means of knowledge, had no actual knowledge, prior to the commencement of the litigation two years ago by the Securities and Exchange Commission, of the fraud perpetrated by Independence. It may be, too, though improbable, that the Pennsylvania Company was unaware of the existence of the fraudulent prospectuses which contained misleading and untrue statements concerning the activities and functions of the Pennsylvania Company with respect to the investment of the moneys and the operations of the trusts.

It is obvious, however, that since the institution of the bill in equity by the Securities and Exchange Commission and the proceedings by the plaintiffs herein, particularly after testimony was taken and the District Courf made its undisputed findings of fact, that the Pennsylvania Company had full and complete knowledge that:

- (a) the stock selling scheme was fraudulent and the beneficiaries, for whom the Pennsylvania Company purports to act as trustee, had been victimized;
- (b) the functions and activities of the Pennsylvania Company with respect to the control and management of the trust had been misrepresented by Independence;
- (c) the name, reputation and responsibility of the Pennsylvania Company had been used as bait for unwary purchasers;

- (d) the load imposed on the trust by Independence was too great for any trust to carry and therefore the stock selling scheme was hopelessly foredoomed to failure; and
- (e) Independence is insolvent and therefore unable to satisfy the claims of all subscribers.

It is submitted that the clear duty of a trustee under such circumstances was promptly to divest itself of association with the fraudulent vendor, to do all things required to be done to protect the property and rights of its beneficiaries, and to notify the beneficiaries that they had been misled and defrauded. Likewise, it should have notified those subscribers who purchased plans because they were informed and had believed that the Pennsylvania Company managed, sponsored and was "in back of" the plan, that the Pennsylvania Company was in reality not a trustee but simply a custodian and bookkeeper, and that Independence could, at any time, discharge the Pennsylvania Company as so-called trustee and appoint a substitute trustee.

The Pennsylvania Company, however, did none of these things. On the contrary, it still pays to Independence the excessive charges exacted by Independence under the void trust certificates. It is vigorously contesting these proceedings, It fought Judge Kalodner's order restraining the Pennsylvania Company from paying to Independence the fund of \$38,258.85.

The record shows, and the Pennsylvania Company admits, that it receives a monthly trustee fee of 25¢ from each of the 18,000 planholders on each payment of \$10 or a fraction thereof (R. 54, 63; Brief of the Pennsylvania Company in the Circuit Court, p. 39).

The question may now fairly be asked whether the Pennsylvania Company is now acting in its own interests or in

the interests of the victimized planholders for whom it claims to be trustee.

It is respectfully submitted that that question has but one possible answer; and that answer compels the conclusion that the Pennsylvania Company should not be permitted to maintain or administer the trust assets.

In addition, the Pennsylvania Company may not retain or administer the trust assets because it does not have the status of any equity receiver responsible to the court. As stated by Judge Kalodner (R. 350, 351):

"Passing now to the similar motion to dismiss on behalf of The Pennsylvania Co. &c., it is sufficient to say that this case differs entirely from that of Gordon v. Washington, 295 U. S. 30. There, the Secretary of Banking had taken over a bank, and the Supreme Court held specifically that 'The Secretary has the status of an equity receiver responsible to the court' in which he had filed a certificate of possession. True, there is no charge here that The Pennsylvania Company, &c., has been guilty of any misconduct, neglect or mismanagement and no testimony thereof. Pennsylvania Company, &c., however, has not the status of an equity receiver responsible to any court. And, if the funds in its hands are to be preserved or distributed for creditors in the instant proceeding, that must be done by an arm of the court—a receiver appointed by the court and responsible to it."

V. The Order Safeguarding the \$38,258.85 Was Proper.

This was an order entered during the process of litigation for the preservation and protection of property in litigation and rights therein.

Since Judge Kalodner found that the charges which this sum represents were not only concealed from plannolders, but were deliberately misrepresented to them (R. 361, 362), the fund belongs to planholders and must be protected from

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dissipation by Independence. In addition, since it is apparent that Independence is insolvent (R. 333-336, 362), this fund should be retained by the court and used to satisfy claims of defrauded planholders.

Such an order is reversible only for abuse of discretion: Kings County Raisin & Fruit Co., et al., v. U. S. Consolidated Seeded Raisin Company, 182 F. 59 (C. C. A. 9th, 1970); Minerals Separation Company v. Miami Copper Company, 269 F. 265 (C. C. A. 3d, 1920); and since Independence neither challenges, disputes nor denies the facts on the basis of which the learned Chancellor entered the said order enjoining the receipt by it of the \$38,258.85, the order is proper; the learned Chancellor abused no discretion in making it; and it should be sustained irrespective of the question whether the Pennsylvania Company is or is not a proper party defendant.

All 8f which is respectfully submitted.

WILLIAM B. RUDENKO, HARRY SHAPIRO, Attorneys for Appellants.

Dated _____, 1940.

Address of Counsel: 1800 Market Street National Bank Building, Juniper and Market Streets, Philadelphia, Pa.

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Supreme Court of the United States CLERK

October Term, 1939.

No. 7 17

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, et al.,

Petitioners.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, et al.,

Respondents.

Brief of the Respondents in Opposition to Petition for Writ of Certiorari.

> FRANK ROGERS DONAHUE, Counsel for Respondents.

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IN THE

Supreme Court of the United States.

No. 733. October Term, 1939.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

v.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, Jr., et al.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Reference to the Official Report of the Opinions Delivered in the Courts Below.

Deckert et al. v. Independence Shares Corporation et al., 27 F. Supp. 763 (1939); Independence Shares Corporation et al. v. Deckert et al.; Pennsylvania Company for Insurances on Lives and Granting Annuities et al., 108 Fed. 2nd, 51, C. C. A. 3rd Cir. 1939.

COUNTER-STATEMENT OF THE CASE.

On March 11, 1939 a Bill in Equity was filed by nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc., seeking the appointment of a receiver for Independence Shares Corporation, a Pennsylvania corporation, the successor to Capital Savings Plan, Inc. and attempting to reach certain

trust assets held by The Pennsylvania Company for Insurances of Lives and Granting Annuities, in trust for planholders (R. 36, 37, 38).

The nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc., predecessor of Independence Shares Corporation (a Pennsylvania corporation), are nine of approximately eighteen thousand planholders who have paid approximately five million dollars (R. 253, 16). The total amount which these nine complainants have paid in on their plans, less the cash withdrawals, is less than three thousand dollars (R. 477, 343-345). None of these nine complainants appeared or testified in the proceeding (R. Index).

The District Court, after filing its opinion, approved an order amending the caption by adding two additional complainants, J. H. Irvin and J. S. Van Sciver, as parties plaintiff (R. 457).

Capital Savings Plan, Inc., predecessor of Independence Shares Corporation, was created for the purpose of spensoring and distributing to the public contract certificates which provide for the purchase of Independence Trust Shares either by monthly payments or by a single payment. Pursuant to the terms of the contract certificates, payments are made to The Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee and after certain authorized deductions, the balance is invested in Independence Trust Shares for the account of the planholders (R. 157).

Capital Savings Plan, Inc. entered into contracts with the complainants whereby the complainants became holders of Capital Savings Plan Contract Certificates. Under the terms of these contracts, Capital Savings Plan, Inc. contracted that The Pennsylvania Company for Insurances on Lives and Granting Annuities would act as Trustee for the holder of Capital Savings Plan Contract Certificate and, as such Trustee, The Pennsylvania Company for Insurances on Lives and Granting Annuities would receive payments made by the contract certificate holder, and after authorized deductions, purchase trust shares which would be held in trust by The Pennsylvania Company for Insurances on Lives and Granting Annuities for the Capital Savings Plan Contract certificate holder individually (R. 129, 130, 137, 165, 424, 425).

The complainants based their prayer for the appointment of a receiver of Independence Shares Corporation on alleged misrepresentations made to them by Capital Savings Plan, Inc. in the sale of Capital Savings Plan Contract Certificates (R. 17).

Capital Savings Plan, Inc. entered into a contract with The Pennsylvania Company for Insurances on Lives and Granting Annuities whereby The Pennsylvania Company for Insurances on Lives and Granting Annuities contracted to act as Trustee for holders of Capital Savings Plan Contract Certificates; to receive payments made by such contract certificate holders and after making authorized deductions invest the balance in Independence Trust Shares and to hold the trust shares as individual trust property for each contract certificate holder, subject only to his order (R. 129, 130, 157, 165, 424, 425).

Independence Shares Corporation creates Independence Trust Shares by the deposit with The Pennsylvania Company for Insurances on Lives and Granting Annuities as Trustee of one share of stock of each of a specified list of corporations for which 1000 Independence Trust Shares are issued. The number of corporations was fifty and is now thirty-five (R. 124, 114, 425).

The complainants filed a bill of complaint against Independence Shares Corporation as successor to Capital Savings Plan, Inc. The bill, in addition to the corporate defendants, names as defendants five directors of Independence Shares Corporation, some of whom are officers (R.7, 10). The relief prayed for was the appointment of a receiver for all corporate defendants other than The Pennsylvania Company for Insurances on Lives and Granting Annuities, and as to the individual defendants no recovery was sought. As to The Pennsylvania Company for Insurances on Lives and Granting Annuities, the bill sought to reach the trust assets held by it for the planholders (R. 36-38).

On June 23, 1938 the Securities and Exchange Commission instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania against Capital Savings Plan, Inc. and Independence Shares Corporation alleging violations of the Securities Act of 1933. On the same day Capital Savings Plan, Inc. and Independence Shares Corporation filed an answer denying the violations, but admitting the jurisdiction of the Court, and that the bill stated a cause of action and consenting to the entry of a final decree. On the same day the Court entered a decree restraining future violations of the Securities Act (R. 30).

On July 12, 1938, the Securities and Exchange Commission allowed a registration statement of Independence Shares Corporation covering both Independence Trust Shares to be sold and those already issued to become effective as of June 14, 1938; and a registration statement of Independence Trust Shares Purchase Plans to be sold by Capital Savings Plan, Inc. to become effective as of June 8, 1938 (R. 370, 427, 428).

The Prospectuses issued under the registration statements of June 8, 1938, and June 14, 1938, contain a "contingent liability" footnote to the balance sheet of Independence Shares Corporation. This contingent liability footnote states that there may be a contingent liability on the part of Independence Shares Corporation for violations of Section 12 (1) of the Securities Act (R. 32).

The complainants asked for the appointment of a receiver for Independence Shares Corporation, successor to Capital Savings Plan, Inc. on the basis that Independence Shares Corporation was insolvent. This allegation was predicated on the contingent liability footnote to the balance sheet of Independence Trust Shares appearing in the prospectus dated January 3, 1939 (R. 32). The contingent liability footnote that appears in this prospectus is a "bring down" of the original footnote which appeared in the prospectus of Independence Trust Shares dated June 8, 1938, and was placed as a footnote to the balance sheet because of contingent liability arising from a possible violation of Section 12 (1) of the Securities Act which relates to the sale of securities without an effective registration statement.

On May 18, 1939 the motions of defendants to dismiss the complaint were denied (R. 454) and on May 27, 1939 the answer of Independence Shares Corporation and the individual defendants was filed, denying all allegations of fraud contained in the Bill and denying the allegation of insolvency (R. 72, 87).

On June 2, 1939 the District Court granted a preliminary injunction against The Pennsylvania Company for Insurances on Lives and Granting Annuities and Independence

Shares Corporation from paying and receiving, respectively, the sum of \$38,258.85 due from The Pennsylvania Company for Insurances on Lives and Granting Annuities to the Independence Shares Corporation (R. 460).

An appeal by the Independence Shares Corporation and individual defendants from the restraining order entered by the District Court was filed in the Circuit Court of Appeals for the Third Circuit (R. 462) and on November 11, 1939 an opinion was there filed, holding that the injunction entered by the District Court was entered in error and stated: "It follows that none of the prayers of the Bill of Complaint, asking for specific relief, may be granted... Accordingly, the orders appealed from are reversed and the cause remanded with directions to proceed in conformity with this opinion." (R. 475-480.)

On December 20, 1939 the Circuit Court refused the petition for re-hearing to the complainants (R. 496). Following this refusal the complainants filed a petition for a writ of certiorari to this Court and a copy of this petition and the record were served on Independence Shares Corporation and the individual defendants on March 1, 1940. It is in answer to this petition and brief that this present brief is filed.

ARGUMENT.

Introduction.

The complainants in their petition for certiorari have alleged five reasons for the allowance of the writ. These are as follows (Petition pp. 5, 6):

- "1. The decision of the Circuit Court is in conflict with decisions of the Supreme Court and other Circuit Courts, as follows: (citing cases).
- "2. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment.
- "3. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder.
- "4. Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed.
- "5. The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act Does Nor authorize injunctive relief, it later indicates that the Securities Act Does authorize injunctive relief."

These will be considered in order below.

 The Decision of the Circuit Court Is Not in Conflict With the Decision of the Supreme Court or Other Circuit Courts,

The complainants state that the decision of the Circuit Court, refusing their petition for the appointment of a receiver, is in conflict with decisions of the Supreme Court and other Circuit Courts. A determination of the status of the complainants and the character of their claims is necessary in considering whether the relief requested was properly refused by the Circuit Court.

The complaint alleges that the complainants are holders of Capital Savings Plan Contract Certificates and that these were sold to them by Capital Savings Plan, Inc. to which the Independence Shares Corporation is the successor (R. 8-10).

The complainants aver that there were material misrepresentations made to them in the sale of Capital Savings Plan Contract Certificates by the predecessor of the Independence Shares Corporation, and therefore, the defendant, Independence Shares Corporation, is liable to them as owners of Capital Savings Plan Contract Certificates under Section 12 of the Securities Act of 1933 (R. 17).

The complainants are not lien creditors or stockholders of defendants, but on the basis of the allegations contained in their bill, they are potential simple contract creditors of Independence Shares Corporation.

Before any of the complainants are entitled to the status of a creditor of Independence Shares Corporation, it is necessary for them to establish a claim under Section 12 of the Securities Act. It is necessary for them to show, as provided in Section 12 of the Securities Act, that the securities were sold to them "by means of a prospectus or

oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care would not have known, of such untruth or omission."

The law is well settled that a simple contract creditor, and a fortiori, a potential simple contract creditor, cannot evoke the aid of a court of equity until he has exercised his remedies at law, first of which is a recovery of a judgment at law and return of execution unsatisfied.

In Pusey and Jones Company v. Hanssen, 261 U. S. 491, 67 L. Ed., 763, 1922, this Court was considering an action brought by a citizen of Norway against Pusey and Jones Company. The plaintiff was a creditor holding promissory notes issued to him by the corporation and was also a stockholder. The requisite diversity of citizenship was present because of a statute giving a Norwegian the right to sue and the Court stated the question involved as follows (p. 495):

"Whether the Federal court, sitting in equity, has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor, is the main question presented."

Mr. Justice Brandeis delivering the opinion of the court stated the law to be as follows (p. 497):

"A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See White v. Ewing, 159 U. S. 36, 40 L. ed.

67, 15 Sup. Ct. Rep. 1018. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill." (citing cases) . . . "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."

Mr. Justice Brandeis then went on and distinguished cases in which a petition for the appointment of a receiver by an unsecured creditor had been allowed where the defendant did not object and joined in the prayer. He stated that these cases were all distinguishable and no authority for granting the relief asked by the simple creditor where his petition for the appointment of a receiver was objected to by the defendant on the ground that the simple contract creditor was not a proper person to request the appointment of a receiver and the Court dismissed the creditor's petition for the appointment of a receiver.

This case was cited and approved in Gordon v. Washington, 295 U.S. 30, 79 L. Ed. 1282 (1934).

In United Statees v. Sloan Shipyards Corporation, 270 Fed. 613, the Court had before it the question as to whether

a simple contract creditor could obtain the appointment of a receiver in the Federal Court. Judge Neterer, speaking for the Court, stated (p. 617): "A federal court has no jurisdiction at the instance of a simple contract creditor whose claim has not been reduced to judgment to appoint a receiver for property on which he asserts no specific lien." (Citing cases.)

This Court, in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, held that a simple contract creditor of a corporation whose claim has not been reduced to judgment, and who has no express lien upon its property, has no standing in a federal court of equity to obtain the seizure of the debtor's property through a receiver and its application to the payment of such debt. In this case, at page 379, the court says:

"It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal court cannot be obliterated by state legislation."

The complainants allege in their Bill of Complaint that they are defrauded purchasers and as such have a right to recover under the Securities and Exchange Act. An analysis of their status and their claim discloses that they are potential simple contract creditors entitled to a money decree and the Circuit Court so decided. The Court R. 478) in its opinion stated: "The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is for a money judgment or for a

money decree payable to the individual who has been defrauded." And the Circuit Court, referring to the Securities Act, states: "Nor does Section 12 (a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497 and the authorities there cited." (R. 479.)

From the above it is apparent that the decision of the Circuit Court in the present case, that a receiver will not be appointed at the instance of the simple contract creditor, is in accord with the decisions of this Court and therefore the first reason assigned by the complainants for the allowance of the writ of certiorari is without merit.

II. The Circuit Court Has Properly Decided the Question That the Securities Act Does Not Authorize Application for the Appointment of a Receiver at the Instance of a Defrauded Firchaser, But Restricts a Defrauder Purchaser to a Civil Action for the Recovery of a Money Judgment.

The complainants give as their second reason why this Court should grant a writ of certiorari "The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment." It is submitted that the Circuit Court has properly decided this question and its opinion is not in conflict with the law as decided by this Court. See Pusey & Jones Co. v. Hanssen, 261-U. S. 491, 497 and authorities there cited.

The complainants have relied upon Section 22 (a) of the Securities Act of 1933 as giving the District Court the power to appoint a receiver for the defendants.

Section 22 (a) of the Securities Act of 1933 provides as follows:

"The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. . . ." (Emphasis ours.)

The Court's attention is called to the fact that both the Federal and State Courts are given jurisdiction of all suits in equity and at law to enforce "any liability or duty created by this title."

It is necessary, therefore, to examine the Act to see what liabilities or duties are created thereby.

Sections 11 and 12 of the Act deal with the civil rights given to individual purchasers. Section 11 considers liabilities on account of false registration statement, of which there is no averment in this case. Section 12 deals with the civil liability arising in connection with prospectuses and communications, and this section alone must determine what rights or duties are given or imposed in Section 22 of the Act cited above.

Section 12 provides:

"Any person who-

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." (Emphasis ours.)

Although this section states that a suit may be brought at law or equity, such a suit may be brought only for the purpose of recovering the consideration paid. In other words, the right given, and the only right given under the Securities Act, is the right to recover a money judgment upon proof of certain facts as provided herein.

An annotation to Section 12 of the Securities Act found in Vol. 1 of Prentice-Hall, Securities Regulation Service, service par. 3151 states:

"The liability is placed upon the person who sells the security, in favor only of the person who purchases the security from him, provided such purchaser did not know of the untruth or omission. This liability is not, however, absolute. The seller may escape liability if he sustains the burden of proof that he did not know of the untruth or omission, and in the exercise of reasonable care could not have known of it (see Par. 3156).

"If the purchaser tenders the security, he may recover from the seller the consideration paid for the security, with interest, less income received; if he no longer owns the security he may recover damages."

From this annotation it clearly appears that the only right which the purchaser of securities has under Section 12 is a right to a money judgment. Nowhere is it even remotely suggested that he could have a right to petition for the appointment of a receiver.

The complainants in a brief filed in the Court below took the position that since Section 22 (a) of the Securities Act gives the Court jurisdiction in law and equity, the complainants, by reason of this grant of jurisdiction, had a right to ask for the appointment of a receiver. What the complainants have failed to take into consideration is the qualifying provision which accompanies the grant of jurisdiction, and restricts the jurisdiction to actions "to enforce any liability or duty created by this title."

The right given to the complainants is to recover money damages only. No right to petition for a receiver is given, and consequently the complainants are in error when they assume that because they are given the right to sue in law or equity in the State and Federal Courts to recover a money judgment, that, therefore, by inference they are given the right to petition for the appointment of a receiver.

The inference which the complainants want the Court to draw is unjustified. An examination of the Securities Act will show that where it was intended to give the right to ask for injunctive relief, the Act makes specific provision.

In Section 20 of the Act, 15 U. S. C. A. 77t, such injunctive power is given to the Commission for the policing and the prosecution of offenses under the Act. No such power is given to an individual or individuals. They were amply protected by giving them a right to a money judgment.

In 23 Wash. U. L. Q. 251 there appears an article on "The Penal and Injunctive Provision of the Securities Act". On page 251 of the article the author states:

"The vital human problem present in the application of penal and injunctive laws necessitates the careful and clear draftsmanship of such enactments. Lawyers and interested parties should be afforded an adequate comprehension of the rights and duties imposed by the legislation. It is the purpose of this note to present the general penal and injunctive provisions of the Securities Act of 1933, and to point out the significant factors which have influenced, or which may influence, the courts in interpreting these provisions.

"The Securities & Exchange Commission is given authority to obtain injunctive relief against anyone who is engaged or is about to engage in any acts or practices which will constitute a violation of the Act or any rule or regulation.

The article discusses the relief, states that the power to request its exercise is limited to the Commission, and concludes on pages 261 and 262 as follows:

"Thus viewed, the penal and injunctive provisions of this complicated Act are for the most part clear

and unambiguous. The decisions interpreting these sections have added little difficulty. The future, of course, will bring new problems and unexpected complications. It is believed, however, that if the purposes of these carefully drafted penal and injunctive provisions are borne in mind, the subtle, exculpatory distinctions are not permitted to develop, these vital problems under the Act will remain relatively simple."

Complainants seek injunctive relief, the above cited authorities show that the Act does not authorize such relief and they are not entitled thereto.

An examination of a number of law review articles dealing with the question of the civil liability of a seller of securities discloses that the writers are of the opinion that the only right that the complainants have are rights set forth in Section 11 and 12 of the Act, and that they are there given a right to a money judgment and to a money judgment alone. Securities Act of 1933; L. K. James, Prof. of Law, University of Michigan Law School, 32 Mich. Review 624; Administrative Interpretation of the Securities Act of 1933, 45 Yale Law Journal 1076.

In 43 Yale Law Journal 227 there appears an article written by Harry Shulman, Associate Professor of Law, Yale University, entitled "Civil Liability and the Securities Act". On page 243 of this article the author in speaking of the civil liability imposed by Sections 11 and 12 of the Act states: "Neither part of the sections puts the seller, under a novel, indeterminate or harsh risk."

It is submitted that the appointment of a receiver based upon the authority of the Securities Act would indeed place upon the seller a novel, indeterminate and harsh risk.

The Judge in the District Court grounds jurisdiction to grant the relief sought on Section 16 of the Securities Act. (Record p. 433.)

Section 16 of the Act, 15 U. S. C. A. Sec. 77pass follows:

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

In an annotation found in Vol. 1 of Securities Regulation Service, Prentice-Hall, Inc. service Par. 3148, dealing with the effect of Section 16 of the Act, it is stated, "There is nothing in the Act, therefore, to prevent an injured person from pursuing the other remedies recognized by the common law or the statutory law of the appropriate state."

This section of the Act does nothing more than to preserve to the purchaser his "other rights and remedies".

The Circuit Court in speaking of this stated:-

"Section 16 of the Act, 48 Stat. 84 (15 U. S. C. A. 77p) providing that 'The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity', does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12 (2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act." (R. 478.)

The Circuit Court has properly decided that a defrauded purchaser of securities under the Securities Act is entitled only to a money judgment. This Court has decided that a simple contract creditor is not entitled to the appointment of a receiver to enforce his claim until such time as he has reduced his claim to judgment. In the present case none of the complainants have reduced their claims to judgment and in fact none of them even appeared or testified in the proceeding (R. Index).

III. The Circuit Court Did Not Decide "That a Defrauded Purchaser of Securities From an Investment Trust May Not, in Equity, Rescind the Contract Induced by Fraud, Avoid the Trust and Recover the Money Paid Thereunder."

The complainants set forth as the third reason for the allowance of a writ of certiorari that "The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder."

A reference to the opinion shows that this statement as to what the Circuit Court decided is erroneous.

The Court on the contrary decided?

"Section 12 (2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person lies in the 'civil action' prescribed by Rule 2 of the Federal Rules of Civil Precedure. The nature of the suit, however, remains as specified by Section 12 (2). The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is

for a money judgment or for a money decree payable to the individual who has been defrauded." (R. 478.)

This clearly shows that the Circuit Court held that a defrauded purchaser could reseind and obtain the money paid under his contract.

IV. Respondents' Appeal to the Circuit Court Was Not Premature and the Circuit Court Properly Entertained the Appeal.

The fourth reason assigned by the complainants for the allowance of a writ of certiorari is: "Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed."

The Judge of the District Court entered an interlocutory injunction enjoining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and Independence Shares Corporation from receiving the sum of approximately Thirty-eight Thousand Dollars due from The Pennsylvania Company to the Independence Shares Corporation. (R. 460.)

This order was the basis of the appeal of the Independence Shares Corporation to the Circuit Court (R. 462, 464).

The Judicial Code Sec. 129 Amended, Acts of Congress, March 3, 1891, c. 517, Sec. 7, 26 Stat. 828 as amended, and 28 U. S. C. A. Sec. 227 provides:

"Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory

order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals." (Emphasis ours.)

In Richmond v. Atwood (Mass. 1892) 5 U. S. App. 151; 2 C. C. A. 596, 52 F 10; the Court in speaking of the statute held that the statute was intended to extend the right of appeal to all classes of interlocutory decrees (of injunctions) which interfere with the possession of property or operate in restraint of trade.

The injunction entered here interferes with the defendant's right of possession of a substantial amount of its property, and the effect of the injunction is naturally harmful to the defendant, Independence Shares Corporation, a dealer in securities.

In Lake National Bank v. Wolfborough Savings Bank (N. H. 1897) 78 F 517, 24 C. C. A. 195, the Circuit Court held that an appeal was proper from an interlocutory decree granting an injunction although the appeal raised only the question of the lower Court's jurisdiction.

In Metropolitan Water Co. v. Kaw Val. Drainage District (Kansas, 1912) 223 U. S. 519, 56 Law Ed. 533, this Court held that in an appeal to the Circuit Court of Appeals from an interlocutory order, the Court could direct the bill to be dismissed if it appeared to it that the complainant was not entitled to maintain his suit.

In view of the plain language of Section 7 of the Act of 1891 and the cases under the Act, it is apparent that the Circuit Court had jurisdiction to hear this appeal and determine whether or not the District Court has jurisdiction

tion to entertain the suit of the complainants for the appointment of a receiver.

It is apparent that respondents' appeal to the Circuit Court was not premature and the Circuit Court properly entertain the appeal.

V. The Opinion of the Circuit Court Is Not Inconsistent.

The fifth reason assigned by the complainants for the allowance of their writ of certiorari is: "The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act Does Not authorize injunctive relief, it later indicates that the Securities Act Does authorize injunctive relief."

The Court's attention is directed to the opinion of the Circuit Court wherein it stated:

"The question of whether the appellees upon a proper showing might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12 (2) of the Act, is not before us and therefore we do not pass upon it." (R. 480.) (Emphasis ours.)

This is the basis for the complainants' statement that the Circuit Court decided that they are entitled to injunctive relief under the Act.

It is apparent that the appellant has misconstrued what the Circuit Court decided, since the opinion stated "we do not pass upon it,"; therefore there is no inconsistency.

CONCLUSION.

It is submitted that the complainants have failed to establish any reason for granting the writ of certiorari. The Circuit Court has not left the complainants without a remedy as under its decision the complainants may establish their right, if any, to recover the consideration paid by them for their securities.

The Securities Act does not give the purchaser of securities the right to enforce payment of an alleged claim against a seller by requesting the appointment of a receiver for the seller. If it did, the seller of securities could not afford to contest the claim of any purchaser no matter what justification it had for refusing to pay it.

It is therefore respectfully submitted that the Court should dismiss the petition for writ of certiorari.

FRANK ROGERS DONAHUE.

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Supreme Court of the United States

October Term, 1940.

No. 17.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, et al.

Petitioners.

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, JR., et al.

BRIEF

Independence Shares Corporation, Alfred H. Geary, Frank McCown, Jr., et al., Respondents.

> ROBERT F. IBWIN, Jr., GEORGE M. KEVLIN, Attorneys for Respondents.

2318 Packard Building, Philadelphia, Pa.

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Supreme Court of the United States.

No. 17. October Term, 1940.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, ET AL., Petitioners,

10

INDEPENDENCE SHARES CORPORATION, ALFRED H. GEARY, FRANK McCOWN, Jr., ET AL.

BRIEF OF INDEPENDENCE SHARES CORPORA-TION, ALFRED H. GEARY, FRANK McCOWN, Jr., BT AL., RESPONDENTS.

QUESTIONS INVOLVED.

Where the amount in controversy is less than \$3,000., does the District Court have jurisdiction under Section 24 (1) (a) of the Judicial Code?

Negatived by the Court below.

Where there is an adequate remedy at law, does the District Court, under Section 24 (1) (a) and Section 24 (8) of the Judicial Code and under the Securities Act of 1933, have jurisdiction to grant equitable relief?

Not passed upon by the Court below.

Does the Securities Act of 1933 give purchasers claiming under Section 12 (2) the right to the appointment of a receiver?

Negatived by the Court below.

Does the Securities Act of 1933 give purchasers claiming under Section 12 (2) the right to bring a class action?

Negatived by the Court below.

Do potential simple contract creditors who have not reduced their claims to judgment have the right to sue for the appointment of a receiver?

Negatived by the Court below.

Is a contingent liability to be considered a liability for the purpose of determining solvency?

Not passed upon by the Court below.

Where the District Court has no jurisdiction to appoint a receiver, is the granting of an injunction in aid of such a request proper?

Negatived by the Court below.

FACTS AND HISTORY OF THE CASE.

This is a bill in equity brought by nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc. (R. 4-6), seeking the appointment of a receiver for Independence Shares Corporation, a Pennsylvania corporation, successor to Capital Savings Plan, Inc., (R. 27), and attempting to reach property held by the Pennsylvania Company in trust for planholders (R. 27).

The complainants are nine of approximately eighteen thousand planholders (R. 200). The total amount which these nine complainants have paid in on their plans, less their cash withdrawals, is less than three thousand dollars, contrasted with approximately five million dollars paid by the other eighteen thousand planholders (R. 12, 274-276). The following is a tabular statement of the accounts of the complainants showing the amounts paid, the withdrawals and the dates of purchase (R. 274-276).

28										
Amt. Fa. in Le	Withdrawals	\$ 80.00	820.00	148.00	300.00	180.00	440.00	460.00	200.00	\$2,925.00
,	Withdrawn			0040	m.cor				300.00	\$405.00
	Paid in	\$ 80.00	480.00 1	340.00	300.00	180.00	440.00	460.00	200.00	\$3,300.00
	Purchaser 45	Bobert J. Deckert	Rowland W. Randal	Rowland W. Randal	David W. Compton	James L. Gleason	Samuel Miller	Irene R. Randal	Joseph Laky	Totals
Date of	Purchase	4, 1938	6, 1937	3, 1937	9, 1934	27, 1937	24, 1934	8, 1935	July 30, 1936	1001 60

Capital Savings Plan, Inc., was incorporated under the laws of Pennsylvaina on October 15, 1931. On December 31, 1938, Capital Savings Plan, Inc., merged with Independence Shares Corporation. At that time Independence Shares Corporation was a wholly owned subsidiary of Capital Savings Plan, Inc. and is the surviving corporation (R. 104, 105).

Capital Savings Plan, Inc., was created for the purpose of sponsoring and distributing to the public contract certificates which provide for the purchase of Independence Trust Shares either by monthly payments or by a single payment (119, 120).

Capital Savings Plan, Inc., entered into contracts with the complainants whereby the complainants became holders of Capital Savings Plan Contract Certificates. Under the terms of these contract certificates, Capital Savings Plan, Inc., contracted that the Pennsylvania Company would act as Trustee for the holder of Capital Savings Plan Contract Certificates, and, as such Trustee, the Pennsylvania Company would receive payments made by the contract certificate holder, and after authorized deductions, purchase trust shares which would be held in trust by the Pennsylvania Company for the Capital Savings Plan Contract Certificate holder individually (Original Exhibit No. 5, offered at R. 270; Original Exhibit No. 1, now lodged with this Court, printed Pa. Co. Appendix pp. 31, 39).

Capital Savings Plan, Inc., entered into a contract with the Pennsylvania Company whereby the Pennsylvania Company contracted to act as Trustee for holders of Capital Savings Plan Contract Certificates; to receive payments made by such contract certificate holders and after making authorized deductions, invest the balance in Independence Trust Shares and to hold the trust shares as individual trust property for each contract certificate holder, subject only to his order (Original Exhibit No. 1 now lodged with this

Court, printed Pa. Co. Appendix pp. 4, 5, 6).

Independence Shares Corporation creates Independence Trust Shares by the deposit with the Pennsylvania

Company as Trustee of one share of stock of each of a specified list of corporations for which 1000 Independence Trust Shares are issued. The number of corporations was fifty

and is now thirty-five (R. 10, 91, 92).

On June 23, 1938, the Securities and Exchange Commission instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania against Capital Savings Plan, Inc., and Independence Shares Corporation alleging violation of the Securities Act of 1933. On the same day Capital Savings Plan, Inc., and Independence Shares Corporation filed an answer denying the violations, but admitting the jurisdiction of the Court, and that the bill stated a cause of action and consenting to the entry of a final decree. On the same day the Court entered a decree restraining future violations of the Securities Act (R. 22).

On July 12, 1938, the Securities and Exchange Commission allowed a registration statement of Independence Shares Corporation covering both Independence Trust Shares to be sold and those already issued to become effective as of June 14, 1938; and a registration statement of Independence Trust Shares Purchase Plans to be sold by Capital Savings Plan, Inc., to become effective as of June 8, 1938 (Original Exhibit No. 15, now lodged with this Court,

p. 27) (R. 61).

The prospectuses issued under the registration statements of June 8, 1938, and June 14, 1938, contain a "contingent liability" footnote to the balance sheet of Independence Shares Corporation. This footnote states that there may be a contingent liability on the part of Independence Shares Corporation for violations of Section 12 (1) of the Securities Act (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39).

The complainants have filed a bill of complaint against Independence Shares Corporation as successor to Capital Savings Plan, Inc., praying for the appointment of a receiver (R. 27). The complainants base their prayer for the

appointment of a receiver of Independence Shares Corporation on alleged misrepresentations made to them by Capital Savings Plan, Inc., in the sale of Capital Savings Plan Contract Certificates (R. 13), and on an alleged insolvency of Independence Shares Corporation arising from a contingent liability footnote appearing on its Balance sheet contained in its prospectus of January 3, 1939 (R. 22-24).

The contingent liability footnote that appears in this prospectus is a "bring down" of the original footnote which appeared in the prospectus of Independence Trust Shares dated June 8, 1938, and was placed as a footnote to the balance sheet because of contingent liability arising from a possible violation of Section 12 (1) of the Securities Act which relates to the sale of securities without an effective registration statement (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39-40).

On March 23, 1939, motions to dismiss the action were filed by Independence Shares Corporation, the individual defendants named and the Pennsylvania Company (R. 81). Testimony was offered on behalf of the complainants in support of their bill (R. 82, 309). None of the complainants appeared or testified (R. II, III, IV), and no testimony was offered showing any fraud or misrepresentations in the sale of securities to them (R. 82-309).

On May 18, 1939, the Court, per Kalodner, J., denied the Motions of the defendants to dismiss the Complaint, and referred the matter to John M. Hill, Esq., as Special Master, to hear and determine the evidence and to decide questions of law or fact on the solvency or insolvency of Independence Shares Corporation (R. 363).

The balance sheet of Independence Shares Corporation as of February 28, 1939, shows that the assets exceed the liabilities by \$63,074.90 (R. 333-336). The allegation of insolvency is predicated solely on contingent liability for a possible violation of Section 12 (1) of the Securties Act of 1933 (R. 22-24).

On May 20, 1939, Motion by Complainants for Preliminary Injunction was filed (R. 31).

On May 25, 1939, Orders by Complainants to Amend the Caption by adding J. H. Irvin and J. H. Van Sciver as parties plaintiff, and the Order of Court approving the same, were filed (R. 366).

On May 27, 1939, the Answer of Independence Shares Corporation and the individual defendants was filed (R. 42).

On June 2, 1939, Exceptions by Defendants to the Orders of Court adding parties plaintiff were filed (R. 367).

On June 2, 1939, Orders of Court Granting Preliminary Injunction against the Pennsylvania Company and Independence Shares Corporation from paying and receiving, respectively, the sum of \$38,258.85, were filed (R. 368).

On June 5, 1939, Notice of Appeal to the Circuit Court of Appeals by Independence Shares Corporation and indi-

vidual defendants, was filed (R. 369).

On November 11, 1939, the Circuit Court of Appeals filed its opinion reversing the orders appealed from and holding that the Court below had no jurisdiction to entertain the request for the appointment of a receiver and that the remedy of an alleged defrauded purchaser is a civil action to recover "the consideration paid by him" (R. 384).

On December 20, 1939, the Circuit Court denied the complainants' petition for a rehearing (R. 391), and on February 17, 1940, the complainants filed, and on March 25, 1940, this Court granted, a petition for writ of certiorari

to the Circuit Court (R. 393).

ARGUMENT.

I. Summary of Argument.

The District Court had no jurisdiction under Section 24 (1) (a) of the Judicial Code as the amount in controversy, viz: the amount claimed by any one or all of the complainants, was less than \$3000.

The amount in controversy is measured by the complainants' claims and not by the amount of the assets sought to be reached. Where the jurisdictional amount is lacking,

it cannot be supplied by adding parties.

Any right to sue in equity under Sections 24 (1) (a) and 24 (8) of the Judicial Code and under the Securities Act of 1933, is subject to the provision that: "Suits in equity shall not be sustained in any Court of the United States where a plain, adequate and complete remedy may be had at law." (Section 267 of the Judicial Code.)

Under Section 12 (2) of the Securities Act a purchaser of securities, claiming misrepresentations in the sale to him, may sue in the District Court to recover the consideration paid by him. Where the consideration is money, his right is to a money judgment which would be obtainable at law.

If the complainants can establish any claim under the Securities Act, they would be entitled to a money judgment, and since they have an adequate remedy at law, they can-

not invoke the unusual jurisdiction of equity.

Complainants' substantive rights are limited to the rights given by the Act under which they are suing, viz: the Securities Act. The petition of the complainants for the appointment of a receiver is without legal justification since the Act under which they claim this right does not give it to them, the only right given being the right "to recover the consideration paid".

No right to bring a class action is given by the Securities Act. A spurious class suit gives the parties thereto no greater right to the appointment of a receiver than they

would have had had they sued separately.

A potential simple contract creditor has no standing to request the appointment of a receiver even if it'be assumed that the corporation for whom the receiver is requested is insolvent and that misrepresentations were made by the corporation in the sale of securities to the potential creditor. Before a creditor can ask for the appointment of a receiver, he must first obtain a judgment and demonstrate that it cannot be satisfied.

Independence Shares Corporation is solvent as shown by its balance sheet. Complainants contend that Independence Shares Corporation is insolvent because of a contingent liability. Contingent liability is not a liability for the purpose of determining the question of solvency or insolvency.

June 14, 1939, was the last day suit could be brought to enforce any claim based on contingent liability as it ceased to exist after that date, since the Securities Act provides that causes of action under Section 12 (1) expire absolutely one year from the date of effective registration.

The District Court erred in enjoining the Pennsylvania Company from paying, and Independence Shares Corporation from receiving, \$38,258.85. This money was due to Independence Shares Corporation by the Pennsylvania Company. This injunction was improper as it was issued in aid of the appointment of a receiver which the District Court had no authority to make.

II. Introduction.

We recognize that the legal question here involved is one of jurisdiction but before we discuss the legal propositions, we feel constrained to point out to this Court certain fundamental inaccuracies in the complainants' brief which we cannot permit to go unchallenged.

One of these inaccuracies is the use by the complainants of the terms "fraudulent per se" and "all-pervasive fraud" as characterizing the nature of the business trans-

acted by Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc.

The Complaint, under Article IV, "History and Method of Doing Business of Defendant Companies" (R. 9, et seq.), shows that Independence Shares Corporation issued to complainants Capital Savings Plan Contract Certificates, that the contract certificates are monthly payment plans issued and sold in unit denominations of \$1200. providing for the payment of \$10. a month on a periodical or instalment basis over a period of ten years; and that under the plans, life insurance policies were obtainable at the option of the contract certificate holder which provided, that upon the death of the subscriber, the insurance company would pay to the trustee in one lump sum the instalment payments remaining unpaid, which sum ranges downward on a \$1200. unit certificate from \$1190. to \$10 (R. 9).

The Bill of Complaint describes the operation of the plan as follows (R. 9, 10):

"25. The Trustee upon receipt of each periodic installment payment deducted and still deducts certain various fees and charges. The said fees and charges included a service fee of \$60 on a ten dollar per month unit certificate, deducted from the equivalent of the first nine monthly payments; a Trustee fee of 25¢ per ten dollar payment or fraction thereof, deducted from each monthly payment; and, on installment payment plans with insurance, an insurance fee at a standard or a sub-standard rate, deducted in proportionately decreasing amounts from each monthly payment.

26. The balance thereof, after the said fees and other charges were deducted, was and is used by the Trustee at the direction of the sponsor to acquire from Independence 'Independence Trust Shares' for the account of each subscriber. These shares are interests in a semi-fixed investment trust of which the Trus-

tee is trustee and Independence issuer and depositor of the shares.

Thus, with respect to the contract certificates sold by Independence, Independence was depositor of the said trust shares as well as sponsor of the contract certificates, whereas, with respect to contract certificates sold by the other investment trust companies, Independence was depositor of the said trust shares and the particular investment trust company sponsor of the contract certificates.

27. Each Independence Trust Share represents a 1/1000th interest in a 'Deposit Unit' previously created by Independence with funds borrowed or supplied The Deposit Unit consists of one share each of the common stock of forty-two corporations and cash accumulations to the proper profortion of a distribution of capital. The price at which Independence Trust Shares were and are sold to the Trustee for the account of the purchasers of contract certificates was and is not the actual creation cost of each share, but was and is computed upon the last sales price of each of the forty-two common stocks which constitute the Deposit Unit as of the day prior to the date of purchase by the Trustee, plus odd lot brokerage commissions and taxes. There was and is then added an arbitrary charge or load of 9 per cent. and any distributable accumulations then applicable to the Deposit This 9 per cent. arbitrary charge was and is divided 11/2 per cent. to Independence and 71/2 per cent. to the sponsor, and it was and is a source of income to the sponsor through the ten year term in addition to the \$60 service charge which was and is deducted from the first nine payments. Independence Trust Shares were and are subject to an additional charge of 21/2 per cent. of currently distributable income and currently distributable principal which charge is deducted semi-annually and paid to the Trustee."

The only testimony offered as to misrepresentations in the sale was testimony relating to misrepresentations made to seven persons none of whom were the complainants. (R. II, III, IV.) In light of the averments in the complainants Bill, and the testimony offered in proof thereof, it is apparent that such expressions as "fraudulent per se" and "all-pervasive fraud" are inaccurate as characterizing the nature of the business transacted by Independence Shares Corporation and its predecessor, Capital Savings Plan, Inc.

The complainants throughout their brief have stated that the defendant, Independence Shares Corporation, is

insolvent. This is inaccurate and misleading.

The complainants' bill, Article VII, "Liability of Defendant Investment Company to Subscriber and Consequent Insolvency", in setting forth the facts on which they predicate the averment of insolvency, states (R. 23, 24):

"43. The said liability of Independence to subscribers, but only with respect to Independence Trust Shares sold during the period from September 1, 1935, to June 14, 1938, has been admitted by Independence in a prospectus dated January 3, 1939, on pages 24 and 25, as follows:

'A contingent liability exists with respect to 1,104,869 Independence Trust Shares sold by the Registrant for the period from September 1, 1935, to June 14, 1938. The actual amount of this contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as of August 31, 1938, is estimated to be \$3,486,000 which amount represents approximately the amount actually received by the Registrant from the sale of such shares but which amount is estimated without adding interest at the rate of 6 per cent. per annum or deducting

distributions made to the holders of Trust Shares. Should the Registrant be required to repurchase Independence Trust Shares pursuant to its contingent liability, the Registrant would, as a result of such repurchase, acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares.'

- 44. Plaintiffs have been informed, believe and therefore aver that the liability of Independence with respect to Independence Trust Shares sold prior to September 1, 1935, and after June 14, 1938, when added to the said admitted liability of \$3,486,000. of Independence Trust Shares sold during the period of September 1, 1935 to June 14, 1938, exceeds exclusive of interest and/or profits, the said sum of \$5,000,000.
- 45. The details of the fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation values of Independence Trust Shares and trust assets held by the Trustee are exclusively within the knowledge, control and possession of Independence, and until and unless the relief hereinafter prayed for is granted, your complainants and other subscribers will have neither knowledge nor means of knowledge of the said facts or any of them.
 - 46. Plaintiffs are informed, believe and therefore aver that a fair valuation of the aggregate of the property and assets of Independence, its affiliates and subsidiaries, including the liquidation value of Independence Trust Shares and the trust assets held by the Trustee, is not sufficient in amount to pay the liabilities and debts of Independence and that Independence is therefore insolvent."

From the above it appears that the averment of insolvency of the defendant, Independence Shares Corporation, is based on a contingent liability, and we will point out later in this brief that contingent liability is not a basis for finding that insolvency exists. The balance sheet of Independence Shares Corporation of February 28, 1939 (R. 333-336) shows that the corporation is solvent. It is, therefore, improper for the complainants to state that Independence Shares Corporation is insolvent.

The complainants have also stated that the defend-

ants have not denied flagrant fraud.

Independence Shares Corporation and the individual defendants in their answer have denied every averment of fraud (R. 5561).

III Jurisdictional Requirements.

(a) Jurisdiction Does Not Exist Under Section 24 (1) (a) of the Judicial Code.

Section 24 of the Judicial Code, as amended, R. S. Section 563, 629; March 3, 1875, c. 137, Section 1, 18 Stat. 470 as amended, 28 U. S. C. A. 41, states:

"The district courts shall have original jurisdiction as follows: of all suits of a civil nature, at common law or in equity • • where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000. and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority • • ."

The complainants claim that the District Court had jurisdiction under the foregoing provision.

The Circuit Court held that one of the requirements for jurisdiction under this provision was absent as the amount in controversy did not exceed the sum of \$3,000.00. The Court, discussing this question, stated (R. 382):

"Nor does the amount in controversy exceed the sum of \$3,000. Section 24 (1) of the Judicial Code as amended, 28 U. S. C. A. 41 (1). The claims of the appellees may not be aggregated and the claim of no one appellee amounts to more than \$2,000. Moore's Federal Practice, Vol. 2, Section 23.08; Pinel v. Pinel, 240 U. S. 594; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77."

The complainants contend that the amount in controversy is to be measured by the assets sought to be reached rather than the amount of the claims of the complainants. This position is unsound because this Court has decided the question to the contrary. In Lion Bonding & Surety Co. v. A. H. Karatz, 262 U. S. 77, 67 L. Ed. 871, considering the jurisdictional questions arising in a petition for the appointment of a receiver, Mr. Justice Brandeis, at pages 85, 86, stated:

"The facts specifically stated show that the amount in controversy was less than \$3,000.00. Plaintiff's claim against the company was \$2,100.00. He prayed that this debt be declared a first lien on the assets within the state. His only interest was to have that debt paid. The amount of the corporation's assets, either within or without the state, is of no legal significance in this connection, nor is the amount of its debts to others."

To the same effect, see Robbins v. Western Automobile Insurance Company (Circuit Court of Appeals, 7 Circuit, 1924), 4 Fed. (2d) 249.

In the instant case, the original complainants are potential creditors whose claims in the aggregate are less than \$3,000.00 (R. 274-276), and under the authorities above cited, the amount of the defendant's assets is immaterial, therefore jurisdiction does not exist under 41 (a) of the Judicial Code.

The complainants, whose bill was filed on March 11, 1939, not having the requisite jurisdictional amount, sought to cure the defect by the addition of two parties on May 25, 1939 each of whom had paid in excess of \$3,000.00 on contract certificates (R. 311, 366). Exceptions to this amendment were filed on behalf of the defendants (R. 367).

Where jurisdictional amount is lacking at the time a suit is instituted, it cannot be supplied by adding additional complainants. Cochrane v. W. F. Potts Son & Co. (C. C. A. 5th, 1931) 47 F (2) 1027; Moore's Federal Practice, Vol. 2, R, 24, § 24.15, pp. 2415, 2416.

The same contention was made before the Circuit Court of Appeals and it properly decided that the amount in controversy did not exceed \$3,000. (R. 382.)

(b) There is no Jurisdiction in Equity Under Section 24 (8).

The complainants state that the Securities Act is a law regulating commerce and that, therefore, the District Court had jurisdiction to appoint a receiver for Independence Shares Corporation under Section 24 (8) of the Judicial Code which reads as follows:

"The District Courts shall have original jurisdiction as follows; * * of all suits and proceedings arising under any law regulating commerce."

This does not, as in Section 1 (a) provide for suits in law and in equity.

The Securities Act gives the right to sue at law or in equity for the purpose of recovering the consideration paid under the conditions provided for in the Act. The right to sue in equity is not an absolute right and is limited by the provisions of the Judicial Code as set forth in Section 267 which provides:

"Suits in equity shall not be sustained in any Court of the United States where a plain, adequate, and complete remedy may be had at law."

The Circuit Court in its opinion states that the District Court had jurisdiction under this section to grant the relief in the Securities Act, viz: the right to recover the consideration paid, and only this right.

The consideration paid by the complainants was money (R. 274, 275) so that a money judgment recoverable at law is the only relief they are entitled to under the Securities Act. The limitation of Section 267 of the Judicial Code applies, and since the complainants have an adequate remedy at law, they have no right to equitable relief.

Even if the allegation that misrepresentations were made to the complainants in the sale of securities to them be considered as true for the purpose of this argument, they would not be entitled to sue in equity. They have an adequate remedy at law, and as was stated by this Court, "equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law". Equitable Life Assurance Society v. Brown, 213 U. S. 25, 50; 53 L. Ed. 682, 693; 29 S. Ct. 402.

The reasons alleged by the complainants for equitable relief and the appointment of a receiver as set forth in their brief on page 26 are as follows:

- "(a) Independence Shares Corporation is insolvent and unable to meet its liabilities.
- (b) A proper accounting can be undertaken only by a receiver appointed by the Court and not by agents and accountants dominated by the defendants.
- (c) The appointment of a receiver will prevent the threatened and probable multiplicity of suits.
- (d) The appointment of a receiver will prevent further dissipation, depletion and waste of assets

equitably belonging to planholders and will preserve and safeguard the said assets.

- (e) The appointment of a receiver will prevent inequitable preferences and will result in the division of all assets equitably among the persons entitled thereto without the necessity of further litigation.
- (f) The litigation and equitable distribution of the assets belonging to planholders should be undertaken only by an officer or representative of the court."

It will be demonstrated that none of these alleged reasons entitle the complainants to sue in equity to recover their consideration by means of a receivership.

As to (a), not only do we establish in another portion of the brief that the corporation is solvent, but we show that potential creditors such as the complainants have no right to the appointment of a receiver even though we were to admit the defendant, Independence Shares Corporation, to be insolvent.

As to (b), the only claim that the complainants have is to recover the consideration paid by them, and any information necessary to establish the amount of that claim is within their knowledge and no accounting of the corporation's affairs generally is necessary. "A mere creditor as such has no right to that remedy." Equitable Life Assurance Society v. Brown, supra at page 44 (L. Ed. 690).

As to (c), a complainant may not urge, as a ground for jurisdiction in equity, that the defendant will thereby be saved a multiplicity of suits by other persons where the defendant raises no objection to such possible suits and urges no such ground for equitable jurisdiction. Equitable Life Assurance Society v. Brown, supra at page 51 (L. Ed. 693).

As to (d), the property belonging to the planholders is held by the Pennsylvania Company as trustee subject only to the order of the individual planholders. The assets

of the defendant, Independence Shares Corporation, are not the property of the individual planholders. Even if the corporation were insolvent, the complainants as potential creditors have no right to seek a receiver or to restrain the defendant in the use of its assets.

As to (e), the only right the complainants have is the right to the return of the consideration paid by them. This right is in no wise prejudiced if they receive a preference as they allege.

As to (f), as we have already pointed out, they have no right to the appointment of a receiver, and therefore, the liquidation and equitable distribution of the defendants' assets will not occur.

IV. Securities Act of 1933 Does Not Give a Defrauded Purchaser Any Right to Ask for a Receiver, But Gives Him Merely the Right to Ask for a Money Judgment Under the Conditions Set Forth in the Act.

The complainants contend that Sections 22 (a) and 12 (2) of the Securities Act of 1933 gave the District Court the power to appoint a receiver for the defendants.

Section 22 (a) of the Securities Act of 1933 reads:

"The district courts of the United States, the United States courts of any Territory, and the District Court of the United States of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title . . ." (Emphasis ours.)

The complainants contend that since Section 22 (a) of the Securities Act gives the District Court jurisdiction in law and equity, the Court, by reason of this grant of jurisdiction, had the right to appoint a receiver. What the complainants have failed to take into consideration is the qualifying provision which accompanies the grant of jurisdiction, and restricts the jurisdiction to actions "to enforce any liability or duty created by this title,"

It is necessary, therefore, to examine the Act to see

what liabilities or duties are created thereby.

Sections 11 and 12 of the Act deal with the civil rights given to individual purchasers. Section 11 considers liabilities on account of false registration statement, of which there is no averment in this case. Section 12 deals with the civil liability arising in connection with prospectuses and communications, and this section alone must determine what rights or duties are given or imposed in Section 22 of the Act cited above.

Section 12 provides:

"Any person who-

- (1) sells a security in violation of section 5, or
- (2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount

of any income received thereon upon the tender of such security, or for damages if he no longer owns the security." (Emphasis ours.)

Although this section states that a suit may be brought at law or equity, such a suit may be brought only for the purpose of recovering the consideration paid. In other words, the right given, and the only right given under the Securities Act, is the right to recover the consideration paid upon proof of certain facts as provided therein. No right to petition for a receiver is given. The complainants are in error when they assume that because the Act gives the right to sue in law or equity in the State and Federal Courts to recover the consideration paid, that, therefore, by inference they are given the right to the appointment of a receiver. The Circuit Court of Appeals thus properly held (R. 383):

"Section 12 (2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person lies in the 'civil action' prescribed by Rule 2 of the Federal Rules of Civil Procedure. The nature of the suit, however, remains as specified by Section 12 (2). The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is for a money judgment or for a money decree payable to the individual who has been defrauded."

An examination of a number of articles dealing with the question of the civil liability of a seller of securities discloses that the writers are of the opinion that the only rights that purchasers of securities have are rights set forth in Sections 11 and 12 of the Act, and that they are there given only a right to recover the consideration paid. Securities Act of 1933; L. K. James, Prof. of Law, University of Michigan Law School, 32 Mich. Review, 624; Administrative Interpretation of the Securities Act of 1933, 45 Yale Law Journal 1076; Prentice-Hall, Securities Regulation Service, Vol. 1, Service Par. 3151.

In 43 Yale Law Journal 227, 243 Harry Shulman, Associate Professor of Law, Yale University, in an article entitled "Civil Liability and the Securities Act", speaking of the civil liability imposed by Sections 11 and 12 of the Act, states: "Neither part of the section puts the seller

under a novel, indeterminate or harsh risk."

"There is nothing, however, which affects a corporation with such serious consequences as does the appointment of a receiver; it is a severe, and may be termed an heroic remedy." MacDougall v. Hunt et al, 294 Pa. 108, 117.

It is submitted that the appointment of a receiver at the request of persons claiming under Section 12 (2) of the Securities Act would indeed place upon a seller of securities a "harsh risk."

The complainants further contend that jurisdiction to grant the appointment of a receiver exists under Section 16 of the Securities Act which reads:

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." (15 U. S. C. A. Sec. 77p.)

The only effect of this section is to preserve to injured persons their remedies at common law or by state statutes. Prentice-Hall Securities Regulation Service, Service Par. 3148.

The Circuit Court of Appeals, considering the effect of Section 16, stated (R. 383):

"Section 16 of the Act, 48 Stat. 84, (15 U. S. C. A. 77p.) providing that 'The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity', does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12 (2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act."

Since the Securities Act of 1933 does not provide for the relief sought by the complainants, the orders of the District Court were properly reversed.

V. The Securities Act of 1933 Does Not Give Complainants Thereunder the Right to Bring a Collective Suit.

The complainants have brought what they term a class bill and argue that the right to bring a class bill entitles them to the appointment of a receiver. It is submitted that the Securities Act of 1933 gives them no right to bring a class bill. The Act gives to each individual a separate right to sue for the consideration paid. Prof. Shulman in "Civil Liability and the Securities Act", supra, states that the Act gives to the purchaser a right to recover a money judgment and that this right is an individual right to be enforced by him individually. On page 251 the author says: "It is to be remembered that no representative action is provided nor is any agency established for the bringing of a collective suit. Each investor must sue separately." (Emphasis ours.)

The Circuit Court of Appeals in its opinion recognizes that the Securities Act does not give claimants the right to bring a class action, but it holds that a spurious class suit may be maintained under Rule 23 (a) (3) of the Federal Rules of Civil Procedure.

The instant suit is not a class suit. It is a spurious class suit which is merely a procedural device extending the field of permissive joinder. It does not give the complainants any greater right to the appointment of a receiver than they would have had if they had brought individual suits. Moore's Federal Practice, Vol. 2, Sec. 23:04—(3), page 2241.

VI. Complainants Are Potential Simple Contract Creditors of the Defendant, and Have No Right to Sue for the Appointment of a Receiver Until They Have Established Their Claims and Reduced Them to Judgment.

The complainants are holders of contract certificates sold to them by Capital Savings Plan, Inc. (R. 5, 6). They aver that there were material misrepresentations made to them in the sale of the contract certificates (R. 13-22), and therefore, the defendant, Independence Shares Corporation, is liable to them under Section 12 (2) of the Securities Act of 1933. (R. 22-24.)

None of the complainants appeared and testified, nor was there any testimony as to any fraud in connection with the sale of the contract certificates to any of the complainants. (R. II, III, IV.)

In determining whether complainants are entitled to the appointment of a receiver it is necessary to determine the relationship between the complainants and the defendant, Independence Shares Corporation.

Capital Savings Plan, Inc. predocessor of Independence Shares Corporation, sold and complainants purchased Capital Savings Plan Contract Certificates (R. 5, 6). The contract between Capital Savings Plan, Inc. and the complainants provided for the issuance to the complainants of contract certificates. Under the terms of the contract certificates, Capital Savings Plan, Inc., contracted that the Pennsylvania Company would act as Trustee for the holders of contract certificates and, as such Trustee, the Pennsylvania Company would receive payments made by the

contract certificate holder, and after authorized deductions, purchase trust shares which would be held by the Pennsylvania Company for the contract certificate holder individually. (Original Exhibit No. 5, offered at R. 270; Original Exhibit No. 1 now lodged with this Court, printed Pa. Co. Appendix, pp. 31, 39.)

Capital Savings Plan, Inc. entered into a contract with the Pennsylvania Company, whereby the Pennsylvania Company contracted to act as Trustee for holders of the gentract certificates, to receive payments made by such contract certificate holders and after making authorized deductions invest the balance in Independence Trust Shares, and to hold the trust shares as individual trust property for each contract certificate holder, subject to his order only. (Original Exhibit No. 1, now lodged with this Court, printed Pa. Co. Appendix, pp. 4, 5, 6.)

The complainants based their cause of action upon alleged misrepresentations on the part of Capital Savings Plan, Inc. in the sale to them of their Capital Savings Plan Contract Certificates. These contract certificates as shown above are contracts between the holder and Capital Savings Plan, Inc. Any claim made by the holder in connection therewith is a claim made in connection with the contract of sale.

The Securities Act of 1933, Section 12 (2) gives the purchaser a right to recover for misrepresentations in the sale of a security. The right is, as it was at common law, a right to recover the consideration paid.

The status of the complainants' alleged right to recover under the Securities Act must be determined by Section 12 (2) of the Act under which their alleged claim would arise. The only right Section 12 (2) gives is "a right to recover the consideration paid for such security . . . upon the tender of such security, or for damages if he no longer owns the security." The complainants are, therefore, potential simple contract creditors.

Before any of the complainants is entitled to the status of a creditor of Independence Shares Corporation, it is necessary for him to establish under Section 12 (2) of the Securities Act that he purchased the securities from the seller who sold them to him "by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care would not have known, of such untruth or omission."

It is also necessary for each of the complainants to show that his cause of action is not outlawed by the statute of limitations appearing in Section 13 of the Act. The Act has two limitation periods, the shorter for one year and the

longer for three years.

Attention is called to the fact that three of the complainants purchased their contract certificates in 1934, one in 1935, two in 1936, two in 1937 and one in 1938, and of the two parties sought to be added as additional complainants, one purchased his contract certificate February 21, 1936, and the other purchased two contract certificates, one October 19, 1932 and one July 16, 1935. (R. 5, 6.)

The complainants' right of action is indeed tenuous and falls far short of the right of a simple contract creditor. At best, their claims are those of potential simple contract

creditors.

The law is well settled that a simple contract creditor, and fortiori, a potential simple contract creditor, cannot evoke the aid of a court of equity until he has exercised his remedies at law, first of which is a recovery of a judgment at law and return of execution unsatisfied.

In Pusey and Jones Company v. Hanssen, 261 U.S. 491, 495, 67 L. Ed. 763, 1933, this Court considered an action brought by a holder of promissory notes on behalf of him-

self and all other creditors. The Court stated the question involved:—

"Whether the Federal court, sitting in equity, has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor, is the main question presented."

Mr. Justice Brandeis, delivering the opinion of the Court, stated the law to be as follows (p. 497):

"A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See White v. Ewing, 159 U. S. 36. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill."

Mr. Justice Brandeis then distinguished cases in which a petition for the appointment of a receiver by an unsecured creditor had been allowed where the defendant did not object and joined in the prayer. These cases are not authority for the appointment of a receiver where the defendant objects. In such cases, upon objection, a petition for the appointment of a receiver will be dismissed.

This case was cited and approved in Gordon v. Wash-

ington, 295 U. S. 30, 79 L. Ed. 1282 (1934).

This court, in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, held that a simple contract creditor of a corporation whose claim has not been

reduced to judgment, and who has no express lien upon its property, has no standing in a federal court of equity to obtain the seizure of the debtor's property through a receiver and its application to the payment of such debt. In this case, at page 379, the Court says:—

"It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal court cannot be obliterated by state legislation."

In discussing this point, the Circuit Court of Appeals, in the course of its opinion (R. 479), stated:—

"Nor does Section 12—(a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 497, and the authorities there cited. It follows that none of the prayers of the bill of complaint asking for specific relief may be granted."

The complainants have not contended that the principles laid down in Pusey & Jones Co., supra, and Hollins v. Brierfield, supra, are not the law, but they endeavor to establish their right to ask for a receiver on the authority of the following cases which they have cited in their brief. Wyman v. Wallace, 201 U. S. 230, 50 L. Ed. 738, (1905); Merchants National Bank et al. v. Chattanooga Construction Co., 53 F. 314; Cook v. Flagg, 233 F. 426.

All these cases are clearly distinguishable from the case at Bar.

The case of Wyman v. Wallace, supra, involved the right of a creditor to bring a bill in equity to enforce a stockholder's double liability under the National Banking Laws and the Court held that Section 2 of the Act of June 30, 1876 providing that liability may be enforced "by any creditor of such association by bill in equity in the nature of a creditor's bill" was applicable and controlling.

In Merchants National Bank et al. v. Chattanooga Construction Co., supra, the bill alleged that the defendant's assets were being diverted and appropriated in fraud of its creditors, and in the opinion of the Court, it is stated: "It charges violation of trust, the distribution and concealment of assets. It charges conspiracy, confederation and fraud for the purpose of despoiling defendant of its assets and leaving its creditors without redress, and all this is done, it is alleged, by its officers and stockholders and these allegations are not denied."

It is apparent that it is no authority for the right of these complainants to seek the appointment of a receiver for Independence Shares Corporation. The complainants in the case at Bar are not even creditors. They have established no claims. All allegations of fraud in the case at Bar have been vigorously denied. There is no allegation in the case at Bar by the complainants that the defendant, Independence Shares Corporation, is being stripped of its assets and property and the record discloses no evidence of it. Furthermore, as hereafter pointed out, Independence Shares Corporation is solvent.

In Cook v. Flagg, supra, the Court appointed a receiver for a fund of \$200,000. which was in the hands of Flagg. He was not a member of the stock exchange. He had devised a fraudulent scheme for speculating in stocks and had been convicted of using the mails to defraud in similar ransactions. There had been entrusted to him \$1,100,000. of which Cook, the complainant, had put up \$10,200. Flagg was financially irresponsible and had only \$200,000. to meet an admited liability of \$1,100,000. Evidence was introduced

showing that Flagg had stated in a letter to the Assistant Attorney General that every dollar of the securities and cash deposited with him belonged to his customers and that he was handling the case and assets of his customers as a fiduciary.

The facts appearing in the Flagg case are totally dissimilar to the facts in the present case. There it appears that Flagg had stated that the fund in question was held by him in trust for the persons who had entrusted him with the funds for investment, among whom was the complainant. The complainants in this case have established no right to recover anything against Independence Shares Corporation.

In addition the person against whom the receivership proceedings were taken was a proved criminal and his criminality existed in connection with a similar fraudulent scheme. The assets themselves were the subject of a trust. In the case at Bar, as has been previously pointed out, no trust relationship exists between the complainants and Independence Shares Corporation. There are no authorities cited in the Flagg case and it is apparent that it is authority only on its own peculiar facts.

VII. Contingent Liability Is Not an Actual Liability and Does Not Establish Insolvency.

The only allegation of insolvency in the complainants' brief is based upon a contingent liability footnote to the balance sheet of Independence Shares Corporation as of August 31, 1938, appearing in the prospectus of Independence Trust Shares of January 3, 1939. (R. 22-24.)

This footnote is a "bring down" of the contingent liability footnote which appeared for the first time on the balance sheet of Independence Shares Corporation as of February 28, 1938, as contained in the prospectus of Independence Trust Shares Purchase Plans of June 8, 1938, page 24, and in the prospectus of June 14, 1938, of Independence Trust Shares under a heading "contingent lia-

bility" on page 39. (Original Exhibit No. 15 now lodged with this Court, pp. 24, 39.)

The footnote is as follows:

"A contingent liability may also exist with respect to 986,906 Independence Trust Shares sold by the Registrant during the period from March 1, 1935, to February 28, 1938. The great majority of these Shares were sold to the Trustee for the holders of Capital Savings Plan Contract Certificates, a few were sold to the sponsors of Plans similar to Capital Savings Plan Contract Certificates and a few were sold to brokers. At the time the Capital Savings Plan Contract Certificates were originally issued during this period, it was believed that all of the holders were residents of Pennsylvania, but a few either later moved out of the Commonwealth of Pennsylvania, or created . Trusts for beneficiaries residing outside of Pennsylvania, or assigned their Contract Certificates to persons residing outside of Pennsylvania. Registrant and its counsel were of the opinion that it was unnecessary to register under the Securities Act of 1933, as amended, any of the Independence Trust Shares so sold. However, the Registrant has now been advised that by reason of the possible interstate nature of certain of the sales, it may be that all of the Independence Trust Shares so sold should have been registered under the Securities Act of 1933, as amended, and that, therefore, the Registrant may have created a contingent liability for rescission or for damages under Section 12 (1) of the Securities Act of 1933, as amended, with respect to such shares. actual amount of this possible contingent liability cannot be accurately determined without unreasonable effort and expense. However, the maximum amount of the contingent liability, as at February 28, 1938, is estimated to be \$3,222,000. which amount represents approximately the amount actually received by the

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Registrant from the sale of such Shares, but which amount is estimated without adding interest at the rate of 6 per cent per annum or deducting distributions made to the holders of Trust Shares. In addition to the contingent liability as at February 28, 1938, there also may be a contingent liability in an indeterminate amount for Independence Trust Shares sold subsequent to said date. Should the Registrant be required to repurchase Independence Trust Shares under Section 12 (1), of the Securities Act of 1933, as amended, the Registrant would, as a result of such repurchase. acquire a beneficial interest in the common stocks underlying the Independence Trust Shares so repurchased. The contingent liability noted in this paragraph does not affect the common stocks underlying Independence Trust Shares." (Original Exhibit No. 15 now lodged with this Court, p. 24.)

This contingent liability has been stated as \$3,222,000. in the footnote of the balance sheet of June 8, 1938, and \$3,486,000. in the footnote of the balance sheet of August 31, 1938 (R. 23). The difference in the amounts is due to the fact that the two statements cover different periods of time and more shares were sold in one period than in the other.

There is no question as to the solvency of Independence Shares Corporation on the basis of its balance sheet (R. 333-336).

A contingent liability cannot establish the insolvency of a business because by definition of the term contingent it is not a liability.

In the case of Equitable Life Assurance Society v. Brown, supra, at page 692, a petition for the appointment of a receiver was filed alleging insolvency of the defendant. The basis of insolvency was predicated upon contingent liability arising from claims that might be made

against the defendant insurance company by the complainant and other policy holders. The Court in disposing of this question at page 692, states:

"The subsequent averment that the defendant is insolvent, because, as a conclusion of law asserted by the pleader, it is responsible to policy holders for excessive sums paid in the way of salaries and fees, and also for sums of money lost consequent upon the fraud. and waste of the directors or officers of the defendant, all of which are too large for the defendant to pay when demanded, is not admitted by the demurrer, and is not accurate as a conclusion of law. Whether such liability could be legally maintained or whether the defendant would be unable to pay the amount claimed from it when it was properly proved, and judgment duly recovered against it in an action for that purpose. is a mixture of a legal conclusion with a matter of opinion as to the future ability of the defendant to pay such liabilities. And the idea that the defendant itself is liable to policy holders for the frauds or wrongdoing set out in the bill and committed by its officers or members of its board of directors against the defendant, and in their personal interests, we regard as without foundation. Such a kind of future possible insolvency furnishes not the slightest ground. for present legal action adverse to the defendant."

In the instant case the allegation of insolvency is predicated entirely upon the fact that the defendant, Independence Shares Corporation, under Section 12 (1) of the Securities Act may become liable to planholders by reason of the sale of securities without an effective registration statement. Since contingent liability is not a real liability for the purpose of determining solvency or insolvency, and since the balance sheet of Independence Shares Corporation shows that it is solvent, there is no equitable jurisdiction based upon insolvency.

In re Nassau (District Court, Eastern District of Pennsylvania 1905), 140 Fed. Reporter 912, Referee Hunter, whose conclusions were adopted by District Judge Mac-Pherson, in speaking of the effect of a contingent liability states: "A contingent debt may doubtless be proven against an asset and the same retained by the trustee to meet the contingency. It does not follow, however, that this contingent debt is to be forced as a present liability and cause the debtor's liabilities to outweigh his assets. The bank-rupt appears entitled to the benefit of the doubt whether this contingent liability will mature into an actual one." (Emphasis ours.)

It further appears that under the Bankruptcy Act of 1898 contingent liabilities are not provable as claims in bankruptcy. In Re: Inman & Co., 171 Fed. Reporter 185.

The contingent liability footnote appearing on page 24 of the prospectus of June 8, 1938, quoted above discloses that it was placed there because of possible claims that might arise under Section 12 (1) of the Securities Act. The basis of the possible liability is the sale of Independence Trust Shares without having an effective registration statement with the Securities and Exchange Commission.

The registration statement of Independence Trust Shares became effective with the Securities and Exchange Commission as of June 14, 1938, and under Section 13 of the Securities Act of 1933 no action can be brought to enforce a liability under Section 12 (1) unless brought within one year after the violation upon which it is based. In the instant case no action could be brought after June 14, 1939. (Original Exhibit No. 15 lodged with this Court, p. 27.) (R. 61.)

On June 15, 1939, contingent liability terminated and there is no averment in the bill and no testimony produced that any suits were instituted under Section 12 (1) prior to June 15, 1939. The only allegation of insolvency having been based on contingent liability and the evidence disclosing that Independence Shares Corporation is solvent, one

of the assigned allegations of the complainants' cause of action, viz: insolvency of Independence Shares Corporation, is untrue.

VIII. The Order of the Court Granting a Preliminary Injunction Enjoining the Payment of \$38,258.85 Was Improper.

In March of 1939 the Pennsylvania Company at the request of Independence Shares Corporation, in accordance with the terms of the trust agreement, sold seven of the forty-two securities underlying Independence Trust Shares (R. 83, 85-90). The District Court found that the - sale of the seven securities was proper (R. 361). A large portion of the proceeds received by the Pennsylvania Company from the sale of these seven securities was reinvested by the Pennsylvania Company for planholders in Independence Trust Shares in accordance with authorization of planholders (R. 281-283). The District Court enjoined the Pennsylvania Company from paying, and Independence Shares Corporation from receiving, the sum of \$38,258.85 due from the Pennsylvania Company to Independence Shares Corporation for creating Independence Trust Shares (R. 368).

There was no justification for this injunction by the District Court, and the Circuit Court of Appeals properly reversed the District Court's order since it found that the District Court had no authority to appoint a receiver and that the granting of an injunction as incidental to the appointment of a receiver was improper.

CONCLUSION.

The complainants' substantive rights stem from the Securities Act, and this Act gives them a money judgment upon proof by them of a cause of action under the Act. This would be an action at law. Thus, complainants have no standing in a court of equity since they have an adequate remedy at law.

Even if it is assumed that misrepresentations were made to the complainants in the sale of securities to them, and that Independence Shares Corporation is insolvent, still complainants are not entitled to the appointment of a receiver as they are potential simple contract creditors.

Independence Shares Corporation is solvent and the position of the complainants that contingent liability establishes insolvency is unsound. Further, it appears that the contingent liability has ceased to exist upon which complainants ground the assumption that Independence Shares Corporation is insolvent.

Independence Shares Corporation filed an answer denying misrepresentations in the sale of securities to the complainants. It stated and proved that it is solvent.

Common sense as well as established law requires that the opinion of the Circuit Court be affirmed.

Respectfully submitted,

ROBERT F. IRWIN, JR., GEORGE M. KEVLIN, Attorneys for Respondents.

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Office - Supreme Court, U. S. FILED. MAR 13 1940

Supreme Court of the United States ERK

October Term, 1939:

No. 784 18

ROBERT J. DECKERT, ROLAND'W. RANDAL, DAVID W. COMPTON, et al.,

Petitioners.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

Respondent.

Brief of the Respondent in Opposition to Petition for Writ of Certiorari.

> WALTER B. SAUL, Counsel for Respondent.

SAUL, EWING, REMIOR & SAUL, Packard Building. .

Philadelphia, Pa.,

Of Counsel.

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Supreme Court of the United States.

No. 734. October Term, 1939.

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETI-TION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

In the interest of brevity we will not attempt to make our own summary of the facts. We point out to the Court, however, the following:

- 1. The complaint alleged (Record p. 15)—"The Independence Trust Shares purchased by the Trustee are held in a common portfolio but the account of each Purchaser is credited with the shares or fraction of shares to which he is entitled. At any time the Purchaser may demand and receive the Independence Trust Shares which are credited to his account, or the liquidating value thereof in cash."
- 2. The complaint does not charge that The Pennsylvania Company was guilty of any misconduct, negligence or mismanagement and there was no testimony to that effect (See opinion of Kalodner, J., Record p. 439; and his state-

ment at the hearing upon the application for an injunction, Record p. 395).

- 3. The aggregate of all the payments made by the nine original complainants was \$3320.00 against which two of them had withdrawn a total of \$468.71. This made the aggregate of the net claims of the nine original complainants \$2851.29, exclusive of interest and cost and exclusive of credit for the value of the Independence Trust Shares held by The Pennsylvania Company, Trustee, for their respective accounts. The largest amount paid by any one of the original complainants was \$810.
- 4. The averments of fraud were denied in the answer of Independence Shares Corporation and the individual respondents.
- 5. None of the complainants testified at any of the hearings.

ARGUMENT.

 The Circuit Court of Appeals Correctly Decided That the Complaint Alleges No Federal Cause of Action Against The Pennsylvania Company.

The Circuit Court of Appeals correctly found that jurisdiction could not be founded upon diversity of citizenship because with one exception all of the complainants were citizens of Pennsylvania and all of the respondents were citizens of Pennsylvania. Lee v. Lehigh Valley Coal Company, 276 U. S. 542; Salem Trust Co. v. Manufacturers Finance Company, 264 U. S. 182. It also correctly found that the claims of the complainants could not be aggregated and that since the claim of no one of them amounted to more than \$2,000, the amount in controversy did not exceed the sum of \$3,000 exclusive of interest and costs. Pinel v. Pinel,

240 U. S. 594; Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77.

The Circuit Court of Appeals found that the District Court had jurisdiction of the controversy by virtue of the provisions of Sections 12 (2) and 22 (a) of the Securities Act of 1933 (15 U. S. C. A. 77 l. (2) and 77 v. (a)), and that since the Securities Act stems from the exercise of federal power under the commerce clause, jurisdiction did not depend upon diversity of citizenship or the amount in controversy.

The Circuit Court of Appeals went on to find that Section 12 (2) of the Securities Act provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce, and that the nature of the suit provided for is one on the part of the defrauded person to seek a money judgment or a money decree to recover "the consideration" paid to him. It correctly concluded that since The Pennsylvania Company was not charged with any violation of the Securities Act it was not a proper part to the suit, and stated in its opinion as follows:

"Since the recovery of the appellees is limited as we have indicated, it follows that The Pennsylvania Company is not a proper party to the suit. The appellees have stated no cause of action against it and indeed have alleged no breach of duty upon its part cognizable under the Securities Act or otherwise. The injunction against The Pennsylvania Company therefore may not be maintained."

II. The Circuit Court of Appeals Correctly Held That None of the Prayers of the Complaint Asking for Specific Relief Could Be Granted.

The prayers of the complaint asked for a receiver of Independence Shares Corporation and its liquidation and that this same receiver take possession of the trust assets in the hands of The Pennsylvania Company and terminate the trusts by making distribution to the beneficiaries. The Circuit Court of Appeals correctly held that Pusey & Jones Co. v. Hanssen, 261 U. S. 491, was in point. In that case this Court held that a receivership is merely an ancillary and incidental relief and not an end in itself, and that a receiver will not be appointed by a federal court at the instance of a simple contract creditor. In our case, the complainants are merely potential contract creditors.

The Circuit Court of Appeals did not cite Gordon v. Washington, 295 U. S. 30 which is also exactly in point. In that case this Court again held that a receivership was not an end in itself, and further held that it was improper for a federal district court to appoint a receiver for a trust in the hands of a competent trustee (See also Home Mortgage Co. v. Ramsey 49 F. (2d) 738).

While in Gordon v. Washington, supra, it was charged that the Pennsylvania Banking Department, which had become successor trustee to certain mortgage pools formerly administered by a closed state bank, was remiss in the administration of its trust, in our case the District Court found that there was no charge nor any testimony that The Pennsylvania Company had been guilty of any misconduct, negligence or mismanagement.

The complainants contend that Section 15 and Section 22 (a) of the Securities Act grant to the District Courts of

the United States the broad and sweeping equitable power to appoint a receiver not only of the seller of securities but also of the trusts set up by the certificates sold. The Circuit Court correctly held that no such additional powers were granted by the Act and that Pusey & Jones v. Hanssen supra, was still the law. It might have added that the Act grants injunctive remedies to the Commission under Sections 8 (b), 8 (d), 8 (e) and 20, and that this evidences the intention of Congress to grant no new injunctive remedies to purchasers.

III. The Circuit Court of Appeals Adequately Preserved the Rights of All the Complainants Against Such of the Respondents as Were Charged with Violations Under the Securities Act.

The Circuit Court has not dismissed the complaint as against any of the respondents excepting The Pennsylvania Company. It held that the District Court should retain jurisdiction of the proceedings as a class suit, and that proper amendments may be made limiting the prayer of the complaint to a demand for a money judgment. It has further protected the complainants by holding that the filing of the original complaint tolled the statute of limitations imposed by Section 13 of the Act.

The complainants, therefore, have been fully protected in the event that they are able to sustain their allegations of fraud at trial. In this connection it will be noted that none of the complainants have as yet testified. IV. Since Each Subscriber May Terminate His Interest in the Trusts at Will, the Aid of a Court in Equity Is Not Required to Terminate for Fraud.

As we have pointed out above, the complaint alleges that The Pennsylvania Company credits each subscriber with the shares or fraction of shares to which he is entitled and that each subscriber may at any time demand and receive the Independence Trust Shares which have been credited to his account or the liquidating value thereof in cash. The right of each subscribed to terminate his interest in the trust is, therefore, an absolute one exercisable by him at will. Fraud or no fraud, this right can be exercised at any time. Since each of the complainants can terminate the trust as to himself at any time, there is no legal justification for an entire termination of the trusts at the instance of a handful of subscribers against the desires of the many subscribers who have permitted their trust assets to remain in the hands of The Pennsylvania Company.

V. A Receivership for the Trusts Would Subject the Trust Assets to Unjustifiable Receiver's Fees and Counsel Fees.

The principal effect of appointing a receiver for the trust assets would be to subject them to unjustifiable receiver's fees and counsel fees. The charges of The Pennsylvania Company are fixed by the contract certificates. It makes a deduction of 25¢ per \$10.00 payment, and until the subscriber had made all of his payments it makes no other charge. The net result is that if any subscriber discontinues his payments The Pennsylvania Company administers his trust assets without charge. If a receiver were to be appointed, he would be entitled to commission upon the

value of the trust assets passing through his hands and commissions upon collected income. He would require the advice of counsel, and in view of the value of the trust assets, the counsel fees claimed would be large.

The principal beneficiaries of a receivership would be the receiver and his counsel.

VI. The Circuit Court of Appeals Had Jurisdiction to Hear the Appeal.

The order of the Lower Court entered on June 2, 1939, restraining The Pennsylvania Company from paying over and Independence from receiving the fund of \$38,258.85, was appealable under the Act of March 3, 1891, as amended (28 U. S. C. A. Section 227) which reads as follows:

"Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals;"

There was no question about the appealability of the order under the language of the Act or under the cases interpreting it. The order was interlocutory and enjoins The Pennsylvania Company from paying and Independence from receiving a large sum of money. It was granted after a hearing (Record pp. 388-416) duly set by the Court upon motions for injunctions which were broad enough to cover the subject matter of the restraining order.

The cases have drawn a distinction between temporary restraining orders granted pending a hearing and interlocutory restraining orders granted after a hearing. The first type are not appealable, and the second are appealable. Smith v. Vulcan Iron Works, 165 U. S. 518; In re Tampa Suburban Railroad Company, 168 U. S. 583; Highland Avenue and Belt Railroad Company v. Columbian Equipment Company, 168 U. S. 627; Houghton v. Meyer, 208 U. S. 149; Pack v. Carter, 223 Fed. 638; Schainmann v. Brainard, 8 F. (2d) 11; Northern Pacific Railway Company v. Pacific Coast Lumber Manufacturers' Association, 165 Fed. 1.

It is of no moment that the order appealed from is intended to preserve the status quo. Enclow v. New York Life Insurance Company, 293 U. S. 379; Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, 293 U. S. 449; Hickey v. Johnson, 9 F. (2d) 498; Morgan v. Kroger Grocery & Baking Company, 96 F. (2d) 470; Metropolitan Life Insurance Company v. Banion, 86, F. (2d) 886; Field v. Kansas City Refining Company, 296 Fed. 800.

The Court is especially referred to two of its recent cases cited above, in which the statute was construed liberally in favor of the appellate jurisdiction of the Circuit Court of Appeals. In the *Enelow* case it was held that the reference of a law case to the equity side of the court was equivalent to an interlocutory order granting an injunction, and in the *Shanferoke* case it was held that the denial of a stay of proceedings in an action on a contract, until arbitration had been held pursuant to the terms thereof, was the denial of an injunction.

The petition for certiorari should be denied.

Respectfully submitted,

WALTER BIDDLE SAUL,
Attorney for Respondent.

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IN THE

Supreme Court of the Unite Stotes Charley

October Term, 1940.

No. 18.

ROBERT J. DECKERT, ROWLAND W. RANDAL,
DAVID W. COMPTON, et al.,

Petitioners.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF

The Pennsylvania Company for Insurances on Lives and Granting Annuities, Respondent.

> WALTER BIDDLE SAUL, FRANGIS H. BOHLEN, JR., Counsel for Respondent.

2301 Packard Building, Philadelphia, Pa.

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Supreme Court of the United States.

No. 18. OCTOBER TERM, 1940.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, ET AL.,

Petitioners,

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

BRIEF OF THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES, RESPONDENT.

QUESTIONS PRESENTED.

- 1. Has a United States District Court any jurisdiction under the Securities Act or the Judicial Code to appoint a receiver for securities held by a bank in trust for individuals, under a Complaint alleging untrue statements and misrepresentations in the sale of the securities to the individuals for whom the bank is trustee:
 - (a) where the bank has not been guilty of any misconduct, neglect or mismanagement, and has incurred no liability under the Securities Act;
 - (b) where diversity of citizenship and required amount involved are lacking; and
 - (c) where the individuals may on demand secure the delivery of their securities, or the fiquidating value thereof, from the bank holding them in trust.

- 2. Should a United States District Court take jurisdiction of a Complaint filed by nine Complainants praying for a receiver of trust assets and the dissolution of trusts;
 - (a) where there are no facts alleged or proven justifying the removal of the Trustee;
 - (b) where there are no facts alleged or proven showing waste or dissipation of the trust assets;
 - (c) where each beneficiary may at any time receive his trust property or the liquidating value thereof upon demand;
 - (d) where the termination of the trusts would constitute a breach of the terms of the trusts;
 - (e) where a receivership would hinder the beneficiaries in exercising the rights granted to them under the trust agreements;
 - (f) where the receivership would result in very large and wholly unnecessary expenses; and
 - (g) where the principal beneficiaries of the receivership would be the receiver and his counsel.

STATEMENT OF THE CASE.

The Pennsylvania Company for Insurances on Lives and Granting Annuities (hereinafter called The Pennsylvania Company) is the Respondent in Appeal No. 18. It took a separate appeal to the United States Circuit Court for the Third Circuit which completely reversed the decision of the District Court of the United States for the Eastern District of Pennsylvania in so far as it was concerned.

The Pennsylvania Company is Trustee under two trusts involved in this appeal. These trust agreements

were offered in evidence and were before the Circuit Court as part of exhibit books surnished to each of the three Circuit Judges. (Exhibits 1, 2 and 3.) Since only one of these exhibit books has been lodged with this Court, we have printed these two trust agreements as an appendix to our brief.

THE CAPITAL TRUST AGREEMENT.

The Trust Agreement dated as of May 1, 1934, between Capital Savings Plan, Inc., (hereinafter called Capital) and The Pennsylvania Company (therein called the Trustee) is the Trust Agreement under which the Contract Certificates held by the nine Complainants were issued. It is printed at length at pages 1 to 45 of the Appendix to our brief.

Under the Contract Certificates and the Trust Agreement the holders of the Contract Certificates agree to make periodic payments to The Pennsylvania Company, Trustee. The usual schedule of payments was \$10.00 a month for ten years or a total of \$1200. From these payments the Trustee is authorized to deduct a trustee fee of 25¢ for each \$10.00 payment or fraction thereof, the proper insurance premium in the case of the Contract Certificates accompanied by insurance, and from the first twelve payments, a fee for Capital of \$60.00 for each \$1200. agreed to be paid. (Appendix p. 5.)

The Trustee is directed by the terms of the Trust Agreement and the Contract Certificates to apply the balance of payments, after deductions have been made, to the purchase of Independence Trust Shares (Appendix p. 5), unless substitution of another medium of investment is made. (Article VI, Appendix pp. 20-22.) There has been no such substitution. The investment is authorized to be made

at the market price, which includes a write-up or load of originally 9%, and at the time of the institution of the proceedings 7½%. The Trust Agreement authorizes the Trustee to apply the dividends and distributions on the trust shares to the purchase of additional trust shares. (Section 3, Appendix p. 6.) Unless the holders of the Contract Certificates become delinquent in their payments for a period of six months (Section 6, Appendix pp. 8-9), their Contract Certificates cannot be terminated by either Capital or the Trustee, so long as trust shares can be purchased. After the Contract Certificateholder has completed all his payments he may withdraw his trust shares or the proceeds thereof, or he may require the Trustee to hold his trust shares for him for a further period of ten years. (Section 4, Appendix pp. 6-8.)

Any Contract Certificate holder, however, may terminate his Contract Certificate at any time and require The Pennsylvania Company, as Trustee, either to deliver him his trust shares or to sell them and remit the proceeds. (Section 5, Appendix p. 8.) Although the purchases of trust shares are made by the Trustee from day to day in bulk, the Trustee keeps accounts showing the amount of trust shares held from time to time for each Contract Certificateholder. (Complaint, Record p. 11.) It is, therefore, at all times in a position to deliver to any Contract Certificateholder the exact number of trust shares (excepting fractional shares) held for his account or the proceeds thereof.

The Trustee may not resign or be removed with respect to its trusts under Contract Certificates already issued. The provisions for resignation and removal (Article V, Appendix pp. 18-20) and termination (Article VIII,

Appendix p. 23) affect only Contract Certificates subsequently issued.

THE INDEPENDENCE TRUST AGREEMENT.

The medium of investment selected by Capital for its Contract Certificates were the shares of an investment trust of the fixed or deposit unit type, known as Independence Trust Shares, which had been on the market for a number of years. The fact that The Pennsylvania Company also happens to be trustee of this trust and that Capital and Independence Shares Corporation (hereinafter called Independence); the sponsor of the Independence Trust, have merged, has caused considerable confusion in this case. At the time of the original selection the Independence Trust was already a large trust and Capital and Independence were entirely distinct and unrelated companies. For the purposes of the Capital Contract Certificates the medium of investment might just as well have been the shares of an investment trust having another corporate trustee, or the shares of an investment company. There are some 1400 holders of Independence Trust Shares who had no connection with Capital.

The Complaint in its attempt to reach trust assets makes no distinction between trust assets held under the Capital Trust Agreement and trust assets held under the Independence Trust Agreement. The opinion of the District Court also fails to make any such distinction. The allegations of fraud in the Complaint are alleged to have been made only in connection with the Capital Contract Certificates. It is, therefore, important to bear in mind that there are two separate trusts and that there are many beneficiaries of the Independence Trust who have had no

concern with Capital and whose trust assets are in danger of seizure and liquidation.

Independence Trust Shares are issued under an Agreement and Declaration of Trust dated as of April 2, 1930 between Independence and The Pennsylvania Company, as Trustee. This Trust Agreement, together with the supplements thereto, will be found at pages 47 to 103 of the Appendix to our brief. The trust shares are issued in units of 1000 against the deposit with the Trustee of a stock unit consisting of one share each of certain companies. Originally the stock unit consisted of one share each of the 50 companies. (Appendix pp. 72-73.) The Bill of Complaint in these proceedings alleges that there were 42 such companies. The testimony shows that the number of companies had been reduced in February 1939 to 35 pursuant to the power of Independence to eliminate.

One of the important purposes of this investment trust is that the stock units underlying each unit of 1000 trust shares shall at any one time always be identical. The Trustee does not buy the stocks of the underlying companies. They are bought by Independence and deposited with the Trustee against the issuance of the trust shares. In order to maintain this balance all stock dividends, subscription rights, et cetera, are required to be sold. (Section IV, Appendix pp. 51-52.) If the stock of any one of the company is split up or changed to a greater number of shares, the extra shares are required to be sold. (Section VI, Appendix pp. 52-53.) The only instance in which the Trustee is authorized to purchase shares is in cases where one of the companies reduces its outstanding capital or merges with another company. In that event, Independence instructs the Trustee whether the number of shares required to preserve the balance shall be purchased from funds available for distribution, or whether the shares shall be entirely eliminated. (Section VII, Appendix pp. 53-54.) The only important power which Independence has with respect to the stock unit is its power of elimination, which may be exercised in its discretion if a usual dividend is passed, if any of the companies shall liquidate voluntarily or otherwise, or if at any time Independence receives information which, in its opinion, would warrant the conclusion that the stock of any of the companies may or will become substantially impaired in value. (Section V, Appendix p. 52.)

The Trustee collects the dividends on the deposited stock and transfers these funds into a distribution account. The Trustee also credits the distribution account with the proceeds of sale of all stock dividends, rights, etc., and proceeds of stock of eliminated companies. (Section X, Appendix p. 55.) The funds in the distribution account are distributed semi-annually to holders of trust share certificates, after paying the expenses of the trust. (Sections I and II, Appendix pp. 58-59.)

The trust share certificates are registered in the name of the holder and evidence the interest of the holder in the trust assets. The registered holder may sell them and transfer them to another holder or he may exercise certain rights of withdrawal from the trust. If he holds 1000 trust shares, he has the right to receive from the Trustee a unit of underlying stocks, plus his prograta share of the distribution account. (Section II, Appendix p. 61.) If he holds less than 1000 trust shares he has the right to receive in cash, a redemption value based upon bid prices of the underlying stocks, plus his pro rata share of the distribution stocks, plus his pro rata share of the distribu-

tion account. (Sections III, IV, V and VI, Appendix pp. 62-63.)

The Trust Agreement contains no provisions permitting the Trustee to resign. Section XVIII (Appendix p. 67) contemplates that the Trustee might be relieved or discharged by a court of competent jurisdiction and in such case Independence has the right to appoint a successor. The Trust, in accordance with the original Trust Agreement was not to be terminated until October 1, 1950. (Section IV, Appendix p. 59.) A Third Supplemental Agreement extended this date to February 28, 1970, unless sooner terminated after September 30, 1950 if less than 500,000 trust shares are outstanding. (Appendix pp. 97-98.)

On June 22, 1938 the Securities and Exchange Conmission filed its Complaint in the United States District Court for the Eastern District of Pennsylvania against Capital and Independence alleging violations of the Securities Act and praying that certain alleged selling practices be enjoined. These two companies filed an answer denying the alleged violations of the Act, admitting jurisdiction and a proper cause of action, and consenting to a restraining decree which was entered on June 23, 1938. At the time Independence had pending before the Commission registration statements for Independence Trust Shares and for revised plans contemplating the purchase of Independence Trust Shares known as Independence Trust Shares Soon after the decree was entered the Purchase Plans. Commission permitted these registration statements to become effective.

On December 31, 1938 Independence and Capital were merged to form Independence Shares Corporation, one of the Respondents in Appeal No. 17.

The Complaint in these proceedings which contained paragraph after paragraph taken from the complaint filed by the Commission, was filed on March 11, 1939 and was followed on March 15, 1939 by a motion for the appointment of a receiver. There were nine original Complainants of whom eight were citizens of the Commonwealth of Penn-These nine Complainants represented an infinitesimal proportion of the many thousands of holders of Capital Contract Certificates. No one of the original Complainants asserted a claim exceeding \$3,000, exclusive of interests and costs. The testimony developed that \$820 was the largest claim of any of the original Complainants and that the aggregate of all of the claims of the nine original Complainants was \$2,925, without giving any credit for the value of their trust shares. (Record pp. 274-276.) The remaining defendants are Independence, certain of its officers and directors and The Pennsylvania Company, all citizens of the Commonwealth of Penasylvania.

The Complaint after alleging violations of the Securities Act on the part of Independence and its predecessor, Capital, went on to recite the proceedings taken by the Commission, the adverse effect of these proceedings on the business of Independence, a large "contingent" liability shown by Independence in its prospectus, and the dissipation of the assets of Independence. The Complaint did not allege any dissipation of the trust assets, nor did it charge that The Pennsylvania Company has been guilty of any misconduct, negligence or mismanagement, or that it had participated in the sale of the Contract Certificates. The Complaint prayed not only for the appointment of a receiver for Independence, for its dissolution and the distribution of its assets, but also for an order directing such receiver to take

possession of the trust assets in the hands of The Pennsylvania Company, to wind up the trusts and to make distribution.

The case, therefore, had two aspects, an attempt to put Independence out of business through the appointment of a receiver, its dissolution and the distribution of its assets, which was the concern of Independence, its officers, directors and counsel, and the attempt to authorize the receiver of Independence to take possession of the trust assets, to break the trusts and make distribution, which was the concern of The Pennsylvania Company and the 18,000 beneficiaries which it represented, including the 1400 holders of Independence Trust Shares who had no concern whatsoever with Capital or its Contract Certificates. The Pennsylvania Company, therefore, filed a motion to dismiss on March 23, 1939, challenging the jurisdiction of the District Court for lack of diversity of citizenship and required amount involved, and for failure to state a proper cause of action. Independence Shares Corporation, and its defendant officers and directors filed a like motion on March 25, 1939.

In the meantime hearings upon the Complainants' motion for the appointment of a receiver were had before the District Court and during these hearings it was testified that Independence pursuant to the Independence Trust Agreement, had in February 1939, upon advice of investment counsel, eliminated the stocks of seven of the companies in the portfolio. Pursuant to the Independence Trust Agreement, the proceeds of these stocks, which The Pennsylvania Company had sold, were distributable on April 1, 1939. Pursuant to the Capital Trust Agreement (Section 3, Appendix p. 6) The Pennsylvania Company was required to purchase additional trust shares with the dis-

contract Certificateholders. The Complainants moved the District Court to restrain the reinvestment, but the District Court actermined that it could not enter any such restraining order unless the Complainants entered a very large bond to protect against any loss which might result from an increase in the value of the trust shares through a rise in market prices. The matter was resolved for the time being by an agreement on the part of coursel for Independence that The Pennsylvania Company should hold, pending the decision of the District Court upon the motions to dismiss and upon the motion to appoint a receiver, a profit of \$38,258.85 which the Independence would realize on the reinvestment.

After further hearings the District Court on May 18, 1939 filed its opinion denying the motions to dismiss and appointing a Special Master to determine the solvency of Independence. Although not one of the Complainants appeared and testified that he had been defrauded, the District Court found that the allegations of fraud had been sustained by the record.

On May 20, 1939 the Complainants submitted to the District Court preliminary injunctions which would have put Independence out of business and entirely restrained the administration of both trusts by The Pennsylvania Company. (Record p. 314.) At the hearing thereon Judge Kaledner stated that he would not at that stage of the proceedings enter any such broad and sweeping injunctions. (Record p. 315.) Counsel for Independence, however, informed the Court that his client was unwilling that the fund of \$38,258.85 should remain in the hands of The Pennsylvania Company (Record p. 310), and the District Court,

on June 2, 1939, entered its order restraining The Pennsylvania Company from paying and Independence from receiving this fund. (Record p. 368.)

Inasmuch as the attempt to seize the trust assets through a receiver was of vital importance to the many thousands of beneficiaries represented by The Pennsylvania Company, and the District Court had denied The Pennsylvania Company's motions for dismissal, The Pennsylvania Company filed its notice of appeal to the United States Circuit Court for the Third Circuit on June 8, 1939. Independence and its defendant officers and directors also filed a prompt appeal. The case was advanced for argument and was argued on August 7, 1939, before Circuit Court Judges Biggs, Clark and Jones. Counsel for the Complainants was permitted to supplement his argument before that Court on August 9, 1939. The opinion of Judge Biggs was filed on November 11, 1939, disposing of both appeals.

Judge Biggs pointed out that since the Complainants, with one exception, were citizens of Pennsylvania, and all of the Defendants were citizens of Pennsylvania, the jurisdiction of the court below could not be sustained upon diversity of citizenship. He also pointed out that the claims of the Complainants could not be aggregated and that the amount in controversy did not exceed the sum of \$3,000 since none of the Complainants claimed more than \$2,000. (Record p. 382.)

As far as The Pennsylvania Company was concerned he found that it was not a proper party to the suit because the Complainants "have stated no cause of action against it and indeed have alleged no breach of duty on its part cognizable under the Securities Act or otherwise". (Record pp. 383-384.) He, therefore, held that the injunction against The Pennsylvania Company might not be maintained.

As far as Independence was concerned he held that the Securities Act did not enlarge the right of the Complainants for the appointment of a receiver for a corporation on the ground that it was insolvent or that its assets were being dissipated, and held that the law in this respect remained as it was, citing Pusey & Jones v. Hanssen, 261 U. S. 491 (1923), and the authorities there cited. He concluded that none of the prayers of the Bill of Complaint asking for specific relief might be granted. (Record p. 384.)

He did hold, however, that the Complaint alleged a cause of action under the Securities Act against Independence for the recovery in a civil action of the considerations paid by the Complainants, and that under the Federal Rules of Civil Procedure the Complaint could be treated as amended for the purposes of trial. He disposed of the argument of Independence that Complainants had no right to maintain a class action by concluding that the suit at bar was of the type denominated as a "spurious" class suit, which could be maintained under the Federal Rules of Civil Procedure and under which the individual Complainants might recover separate judgments in different amounts.

The Complainants filed a motion for a reargument which was denied on December 20, 1939. Complainants, thereupon, appealed to this Court and a certiorari was granted on March 25, 1940.

ARGUMENT.

At the outset of our argument we wish to make our position clear in view of certain statements contained in the Complainants' brief.

Since the questions which were before the Circuit Court of Appeals and are now before this Court, relate to jurisdiction and the allegation in the Complaint of a proper cause of action, the averments of misrepresentations in the sale of securities must, for the purpose of argument and for the time being, be accepted as true. The answer filed by Independence and its officers and directors deny these averments (Record pp. 55-61). There has been no trial upon the issues framed by the Complaint and answers, and none of the Complainants have yet testified that they were defrauded.

We have at no time admitted that either the Capital Contract Certificates or the Trust Agreements were fraudulent per se. There was no such allegation in the Complaint and this argument was not advanced by the Complainants until they filed their brief in the Circuit Court of Appeals.

There was no allegation in the Complaint that the trust assets were being dissipated.

The District Court in its opinion (Record p. 351) found that there was no charge that The Pennsylvania Company had been guilty of any misconduct, neglect or mismanagement and no testimony thereof. At a subsequent hearing the District Court stated that it was its understanding that there was never a contention made by the Complainants that there was any criticizable conduct on the part of The Pennsylvania Company and that he had tried to make this clear in his opinion (Record p. 316).

I. The District Court Had No Jurisdiction Under the Securities Act or Under the Judicial Code to Appoint a Receiver for the Securities Held by The Pennsylvania Company.

The Complaint alleges that Independence and its predecessor, Capital, in the sale of saving plan contract certificates and trust shares, by the use and means of instruments of transportation or communication in interstate commerce, and by the use of the mails, directly or indirectly, have defrauded and are defrauding the Complainants and other subscribers of both money and property by means of untrue statements, misrepresentations and concealments, and omission to state material facts necessary in order to make the statements, in the 'ght of the circumstances under which they were made, not misleading (paragraph 33, Record p. 13), and goes on, in considerable detail, to state the misrepresentations alleged to have been made. The Complaint also alleges upon advice of counsel that under the Securities Act, Independence is liable to the subscribers for all money paid in, together with interest thereon, on contract certificates sold or issued in the three years last past (paragraph 40, Record pp. 22-23).

There is no allegation that The Pennsylvania Company participated in the sale of the savings plan contract certificates or trust shares. There is no claim that The Pennsylvania Company is liable to the subscribers under the Securities Act.

The District Court found in its opinion (Record p. 351) that "there is no charge here that The Pennsylvania Company has been guilty of any misconduct, neglect or mismanagement, and no testimony thereof.", and at a hearing held

subsequent to the filing of its opinion made the following statement which appears in the Record at page 316:

"As I understand it, there was never a contention made by the plaintiffs that there was on the part of the Pennsylvania Company any criticizable conduct. I tried to make that as clear as my language would permit, in my opinion, that there was nothing criticizable in the conduct of the Pennsylvania Company. There was no complaint made of the Pennsylvania Company."

Complainants in this appeal contend that there are three separate bases of jurisdiction: Section 24 (1) (a) of the Judicial Code; Section 24 (8) of the Judicial Code; and Sections 12 (2) and 22 (a) of the Securities Act.

THERE IS NO JURISDICTION OF THE PENNSYL-VANIA COMPANY UNDER SECTIONS 12 (2) AND 22 (a) OF THE SECURITIES ACT.

Section 12 (2) of the Securities Act imposes upon any fraudulent seller of a security by the use or means of instruments of transportation or communication in interstate commerce or of the mails, a liability to any person purchasing such security from him, who may sue "either at law or in equity" in any court of competent jurisdiction to recover the consideration paid with interest thereon, less income received, upon tender of the security or for damages if he no longer owns the security. Section 22 (a) provides that the District Courts of the United States shall have jurisdiction, concurrent with State and Territorial courts, of all suits in equity or actions at law brought to enforce any liability or duty created by the Act.

In holding that The Pennsylvania Company was not a proper party to the suit the Circuit Court in its opinion

states (Record p. 384): "The appellees have stated no cause of action against it and indeed have alleged no breach of duty on its part cognizable under the Securities Act or otherwise.". We fail to see how the Circuit Court could have reached any other conclusion. The jurisdiction of the proceedings as far as The Pennsylvania Company is concerned cannot be based upon the Securities Act.

Monarch Anthracite Mining Co. v. Coffin, 102 F. (2d) 337 (C. C. A. 3d, 1939), is in point. In that case a corporation known as the Scranton Coal Co. had filed a petition under Section 77B of the Bankruptcy Act and the District Court, therefore, had jurisdiction of the corporation. Creditors of the corporation filed a class bill in the same court seeking a receiver of Monarch Anthracite Mining Company to which a mine owned by the Scranton Coal Company had been leased. Upon appeal the Circuit Court held that there was no power to appoint such a receiver without Monarch's consent (citing Pusey & Jones Co. v. Hanssen, 261 U. S. 491), and that the court below was not justified in appointing a receiver for Monarch or for any mine leased or operated by it, because Monarch was solvent and able to meet any liability decreed against it, and no waste or improper operation of the mine had been proved or charged. In our case the Circuit Court has decided that the District Court had jurisdiction of Independence, but there is no question about the solvency of the trusts, because they have no There is no charge of improper administration on the part of The Pennsylvania Company, as Trustee, and by the very terms of the trusts any beneficiary may receive his trust assets or the liquidating value thereof upon demand without resort to a court of equity.

THERE IS NO JURISDICTION OF THE PENNSYL-VANIA COMPANY UNDER SECTION 24 (8) OF THE JUDICIAL CODE

This Section of the Judicial Code grants to the District Courts jurisdiction "of all suits and proceedings arising under any law regulating commerce.". Since the only law regulating commerce involved is the Securities Act, since the Complaint does not allege any violation of the Act by The Pennsylvania Company, and since the District and Circuit Courts have both found that The Pennsylvania Company has not violated any law regulating commerce, or in fact any other law, there is no jurisdiction under this Section of the Judicial Code.

THERE IS NO JURISDICTION OF THE PENNSYL-VANIA COMPANY UNDER SECTION 24 (1) (a) OF THE JUDICIAL CODE.

This Section grants to the United States District Courts jurisdiction of civil suits at common law or in equity where the matter in controversy, exceeds, exclusive of interests and costs, the sum or value of \$3,000 and (a) arises under the Constitution or laws of the United States.

Here again, since The Pennsylvania Company has not violated any federal law, there is no jurisdiction and we have the added fact that the amount in controversy in accordance with the decisions of this Court, does not exceed the sum or value of \$3,000 exclusive of interests and costs.

It is well settled that the claims of a number of Complainants cannot be aggregated: Pinel v. Pinel, 240 U.S. 594 (1916); Lion Bonding & Surety Co. v. Karntz, 262 U.S. 77 (1923), and as the Circuit Court had found in its opinion, no one of the original Complainants claimed more than

\$2,000. (Record p. 382.) In fact if was shown by the testimony that the largest claim of any of the original Complainants was \$820 and the aggregate of all claims \$2,925. (Record pp. 274-276.)

Adding additional Complainants asserting claims of \$3,000 and over (Record p. 366) could not give the District Court jurisdiction which it did not have in the first instance: Pianta v. H. M. Reich Co., 77 F. (2d) 888 (C. C. A. 2d, 1935).

The only other possible basis for jurisdiction would have been under Section 24 (1) (b) of the Judicial Code which requires diversity of citizenship in addition to the required amount involved. Since the Complainants with one exception are citizens of Pennsylvania and all the remaining Defendants are citizens of Pennsylvania, the Circuit Court found in its opinion that Jurisdiction could not be sustained upon diversity of citizenship (Record p. 382), Lee v. Lehigh Valley Coal Company, 267 U. S. 542 (1925); Salem Trust Co. v. Manufacturers Finance Co., 264 U. S. 182 (1924). The Complainants do not argue the point of diversity of citizenship in their brief. We may assume that they have concluded that the Circuit Court was correct and that the jurisdiction of the District Court could not be sustained upon any such basis.

The Circuit Court was, therefore, correct in holding that The Pennsylvania Company was not a proper party to the proceedings.

II. The Securities Act Does Not Grant to the United States District Courts New and Broad Powers to Appoint Receivers.

Complainants argue that since Section 12 (2) of the Securities Act grants to any defrauded purchaser of secu-

rities the right to sue a defrauding seller of securities in equity, and since Section 22 (a) of the Act confers upon the District Courts of the United States jurisdiction of all suits in equity to enforce any liability or duty created by the Act, it was intended that a United States District Court should have the new and bread power to appoint receivers, not only of the corporation seller, but of the securities sold by the seller in the hands of a third party acting as trustee for the purchasers. That Congress had no such intention is disclosed by an analysis of the Act.

Prior to the enactment of the Securities Act, the law of this Court with respect to the appointment of receivers was well settled. Simple contract creditors have no equitable lien on the assets of a corporation, and they have no right to a receiver unless they have reduced their claims to judgment and can show that execution is likely to be fruitless: Hollins v. Brierfield Coal & Iron Company, 150 U.S. 371 (1893). A receivership of a corporation is not an end in itself. A United States District Court has no power to appoint a receiver for a corporation on the ground of insolvency at the instance of a simple contract creditor in the absence of a consenting answer by the corporation, even though a statute of the State in which the District Court is sitting authorizes the appointment of a receiver upon such grounds. Pusey & Jones Cq. v. Hanssen, 261 U. S. 491 (1923). A receiver will not be appointed for a trust where the only end of the receivership is to supplant. a trustee who is not charged with mismanagement and where a receivership will result in unnecessary expense. Gordon v. Washington, 295 U.S. 30 (1935).

It is not argued that the appointment of receivers by District Courts depends upon specific federal statutes. Equitable jurisdiction of suits of a civil nature is granted

to the District Courts by Section 24 (1) of the Judicial Code. The jurisdiction thus conferred is an authority to administer in equity suits the principles of a system of judicial remedies which had been devised and was being administered by the English Courts of Chancellery at the time of the separation of the two countries. Atlas Insurance Co. v. Southern, Inc., 306 U. S. 563, 568 (1939). This Section of the Judicial Code does not define the jurisdiction of the District Courts. It merely prescribes the body of the doctrine which is to guide their decisions and enable them to determine in any given instance whether a suit of which a District Court has jurisdiction as a federal court is an appropriate one for the exercise of the extraordinary powers of a court of equity: Atlas Insurance Company v. Southern, Inc., supra. Mere prima facie jurisdiction under Section 24 (1) of the Judicial Code on the basis of diversity of citizenship and the required amount involved does not in itself confer the power to appoint a receiver. The District Court must also determine whether, in accordance with the accepted principles of equity, any state of facts is presented which calls for the exercise of its extraordinary power as a court in equity. Gordon v. Washington, supra.

There is no mention of the appointment of a receiver in any of the provisions of the Securities Act, which was passed by Congress for the purpose of requiring truth in the sale of securities. It has three general divisions: criminal responsibility and its enforcement; regulation by the Commission with power of investigation and injunction; and civil liability of the seller with the right of the aggrieved purchasers to bring suit to recover the purchase prices or damages.

The Commission is granted the right to enjoin frauds upon the investing public in the sale of securities as well as

powers designed to prevent such frauds. Under Section 8 (b) the Commission may refuse to permit a registration to become effective. It may issue stop orders under Section 8 (d) and conduct investigation under Section 8 (e). It has the power to make and rescind rules and regulations under Section 19 (a), and its members and officers have the power in all investigations to administer oaths, subpæna witnesses, take evidence, and require the production of any books, papers and documents deemed relevant by the Commission. Lastly, and important for the purposes of our. case, the Commission has the power under Section 20 to institute proceedings for injunctive relief to prevent violations of the Act and to apply for writs of mandamus to compel compliance with the Act. No injunctive remedies are granted by the Act to aggrieved purchasers. Their only remedy is to bring suits under Section 12 for the recovery of the purchase price paid if they have disposed of their securities, or for damages if they still hold them.

Administrative law has been greatly expanded in this country in recent times. Many commissions have been created by Acts of Congress having broad powers over matters of vital national concern. The Commission created by the Securities Act performs an important and necessary function in regulating the sale of securities in interstate commerce and through the mails, and it is plain that Congress intended that the Commission was to have and exercise the power to prevent and enjoin frauds.

In the case at bar the Commission made its investigation of the selling activities of Capital and Independence and pursuant to the powers granted to it under the Act brought proceedings it deemed necessary and obtained injunctive relief. It is indicative that after the decree had been entered enjoining sales practices which both Capital and Independence at the time denied, registration statements filed with the Commission for Independence Trust Shares and for Independence Trust Shares Purchase Plans were permitted to become effective.

Even the most ardent advocates of the expansion of administrative law and of the vesting in commissions of broad power of regulation, would not suggest that each and every individual citizen should also be invested with the power of appealing to the courts for the purpose of having the courts exercise powers granted to these commissions. In the case of the Securities Act, Congress plainly intended that the courts were to have the power of granting injunctive relief only at the instance of the Commission for the purpose of preventing security frauds upon the public in general. The defrauded purchasers were intended only to have the right to bring suits to redress the wrong done to them individually.

III. The District Court in This Case Should Not in Any Event, Appoint a Receiver of the Trust Assets and Decree a Dissolution of the Trusts.

As we have pointed out above, the District Court had no jurisdiction of The Pennsylvania Company because it had violated no federal law and because diversity of citizenship and required amount involved were lacking. While we might have confined our argument to matters relating only to jurisdiction, we feel it incumbent upon us to point out to this Court the many reasons why a court in equity should not grant the relief prayed for against The Pennsylvania Company and the trust assets in its hands.

The leading case in this Court upon the subject of the appointment of a receiver for a trust fund is Gordon v.

Washington, 295 U.S. 30 (1935). In that case, diversity of citizenship and required amount involved were present and the United States District Court for the Eastern District of Pennsylvania had prima facie jurisdiction under Section 24 (1) (b) of the Judicial Code. It appointed a receiver for mortgage pools which had been held in trust The bank had failed and the Pennsylvania · Secretary of Banking had taken possession under the Pennsylvania Banking Code. As an incident of this possession, the Secretary of Banking took possession of the mortgage pools. .The District Court found that nothing had been done by the banking department to provide the means for an active, intelligent and responsible administration of the mortgage pools, and on this ground it appointed a receiver. The Circuit Court of Appeals on the basis of this finding determined that there had been no abuse of discretion and the Secretary of Banking appealed to this Court. Court reversed the decrees below and remanded the cause with directions to the District Court to dismiss the bills and discharge the receivers.

This Court in its opinion pointed out that where the defendant challenges the sufficiency of a complaint and the appropriateness of the appointment of receivers, it was not enough for the District Court to decide that as a federal court it had power to act, and that it should also determine whether, in accordance with accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity. We take the following from the opinion of this Court at page 36:

"Since the court had power to act, it is necessary to consider the various objections urged to the decree only insofar as they are addressed to the propriety of

its action as a court of equity. These objections were not foreclosed by the determination that the court had jurisdiction. By the Judiciary Act of 1789, c. 20, § 11, 1 Stat. 73, 78; U. S. C. Tit. 28, § 41 (1), the lower federal courts were given original jurisdiction "of suits . . . in equity," where the other jurisdictional requisites are From the beginning, the phrase "suits in satisfied. equity" has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have . been developed in the federal courts. Robinson v. Campbell, 3 Wheat. 212, 221-223; United States v. Howland, 4 Wheat. 108, 115; Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43. When the petitioners challenged the sufficiency of the bills of complaint and the appropriateness of the appointment of receivers, it was not enough for the district court to decide that as a federal court it had power to act. It should also have determined whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity."

This court pointed out that the sole relief prayed for by the complaints was the appointment of receivers and the command of the court that property shown to be in the lawful possession of the Secretary of Banking, be surrendered to them. It held that a receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity and that it was not an end in itself; that there was no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition, and that even when a bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some

threatened loss or injury to the property, which the receivership would avoid. It held that the finding of the District Court that nothing had been done by the department of banking to provide the means for an active, intelligent and responsible administration of the mortgage pools was without support in the record, and reversed the decrees below and directed the District Court to dismiss the bills and discharge the receivers.

Since the principles of law laid down by this Court in Gordon v. Washington are of utmost importance in the case at bar, we quote the balance of this Court's opinion commencing at page 36:—

"The sole relief prayed by the bills was the appointment of receivers and the command of the court that property, shown to be in the lawful possession of the petitioner acting as a temporary trustee or fiduciary, be surrendered to them. A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose, the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure, Wallace v. Loomis, 97 U. S. 146, 162; Union Trust Co. v. Illingis Midland Ry. Co., 117 U. S. 434, 455; Hitz v. Jenks, 123 U. S. 297, 306; Freedman's Saving & Trust Co. v. Shepherd, 127 U. S. 494, 500-504; Shepherd v. Pepper, 133 U. S. 626, 652, of trust property pending the appointment of a new trustee, Underground Electric Rys. Co. v. Owsley, 176 Fed. 26 (C. C. A. 2d); Ball v. Tompkins, 41 Fed. 486, 489 (C. C.); cf. Haines v. Carpenter, 1 Woods 262, aff'd 91 U. S. 254, or of property which a judgment

creditor seeks to have applied to the satisfaction of his judgment, Covington Drawbridge Co. v. Shepherd, 21 ° Hcw. 112, 125; Ogilvie v. Knox Insurance Co., 22 How. 380, 392; Ingle v. Jones, 9 Wall. 486, 498.

"But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. Anonymous, 1 Atkyns 489, 578; Ex parte Whitfield, 2 Atkyns 315; Goodman v. Whitcomb, 1 Jacob & Walker 589, 592; Robinson v. Hadley, 11 Beavan 614; Roberts v. Eberhardt, Kay 148, 160, 161. It is true that the receivership of an insolvent corporation, upon the application of a simple contract creditor with the consent of the corporation, has been recognized by the federal courts as an appropriate form of relief when the end sought is the liquidation of the assets and their equitable distribution among the creditors. Brown v. Lake Superior Iron Co., 134 U. S. 530; Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110; Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 500, 501; United States v. Butterworth-Judson Corp., 269 U. S. 504, 513, 514; compare Harkin v. Brundage, 276 U. S. 36, 52; Michigan v. Michigan Trust Co., 286 U.S. 334, 345; Shapiro v. Wilgus, 287 U. S. 348, 356; National Surety Co. v. Coriell, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U.S. 504, 525. Whether this exercise of jurisdiction, to liquidate or conserve the assets of a corporation through the agency of a receivership, is to be supported as an extension of that exercised over decedent's estates, see Glenn on Liquidation, §§ 154-161, or of remedies afforded to judgment creditors where legal remedies are inadequate, see Manhattan Rubber.Mfg. Co. v. Lucey Mfg. Co., 5 F. (2d) 39, 42 (C. C. A. 2nd), it has never been extended to other classes of cases. Whenever the attempt thus to extend it, by

using the receivership as an end instead of a means, has been brought to the attention of this Court, it has pointed out that a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give. Pusey & Jones Co. v. Hanssen, supra, 497; Booth v. Clark, 17 How. 322, 331; see Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371.

"Respondents' bills of complaint not only failed to seek any remedy other than the appointment of receivers, but they failed to disclose any basis for equitable relief by the appointment of receivers or otherwise. Respondents are not shown to be creditors, much less judgment creditors. As beneficiaries of the fiduciary relationship of the trust company, and later of the Secretary, to the mortgage pools, they failed to allege misconduct or neglect on which any equitable relief could be predicated. They did not show that there was any danger to the assets of the mortgage pools, or to their management, which would be avoided or removed by the appointment of receivers. Petitioner did not waive these defects of the bills, or consent to the appointment of receivers.

"We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed. Gordon v. Ominsky, supra; Pennsylvania v. Williams, supra. Even when the bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some threatened

loss or injury to the property, which the receivership would avoid. Here no such showing was made. It is true the district court found that nothing had been done by the Banking Department to provide the means for an active, intelligent and responsible administration of the mortgage pools. The Court of Appeals, on the basis of this finding, thought there had been no abuse of discretion. But that finding is without support in the record.

"The court below erred in not directing dismissal of the bills of complaint as failing to state a cause of action in equity. The appointment of receivers, in the circumstances, was an abuse of discretion which should have been promptly set aside on the applications of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers."

Home Mortgage Company v. Ramsey, 49 F. (2d) 738 (C. C. A. 4th, 1931), decided by the Circuit Court of Appeals, Fourth Circuit, is also directly in point. In that case the corporation had issued more than \$10,000,000. of its bonds under five trust indentures of which First National Bank of Durham, N. C., was trustee, and had pledged as collateral therefor notes and mortgages of individual borrowers. The plaintiff owned \$3,500. of one of the series of bonds and filed her complaint alleging insolvency and mismanagement of the corporation and praying for the appointment of a receiver of the corporation and of the trust assets. The District Court appointed receivers of the corporation and continued the trustee in its duties as trustee in connection with the receivers. The Circuit Court of Appeals reversed the District Court and remanded the case with directions to vacate the receivership, order the property of the defendants returned to them forthwith and to

dismiss the suit. We take the following from the opinion at pages 742-743:

. "In effect, it is nothing more than a bill to take charge of a trust estate because of misconduct or incompetency of the trustee, or such mismanagement as would amount to waste. Here the proofs are lacking to show any misconduct or mismanagement on the part of the trustee, and both the special master and the district court have found there was none. The District Court has not attempted to remove the trustee, but, on the contrary, has continued the trustee in its duties as trustee in connection with the receivers. Consequently, this is not a case where the trust is being abused, and the court of equity is removing the trustee and directing the administration of the trust. were, a receivership of the trust estate pendente lite would be proper and a receivership of the other property of the corporation might be proper as incidental relief, but certainly it is not proper where the trust is to be administered by the trustee, and the only effect of the receivership would be to create charges against the funds in the hands of the trustee."

NO FACTS WERE ALLEGED OR PROVEN JUSTIFY-ING THE REMOVAL OF THE PENNSYL-VANIA COMPANY AS TRUSTEE.

As we have pointed out above, the District Court found in its opinion that it had been not charged in the Complaint or shown by the testimony that The Pennsylvania Company had been guilty of misconduct, neglect or mismanagement and at a subsequent hearing stated that there had been no criticism of The Pennsylvania Company. The Pennsylvania Company is a responsible and well established trust company, and its functions and duties as trustee under the trust agreements although ministerial in nature are explicit, and are being carried out by it faith-

fully. The case at bar is entirely different from such cases as Cook v. Flagg, 233 F. 426 (C. C. A. 2d, 1916), cited by the Complainants in their brief, where the defendant, Flagg, a stock broker in possession of his clients' securities, had been convicted of using the mails to defraud.

The District Court in its opinion attempted to distinguish Gordon v. Washington, supra, on the theory that in that case the Pennsylvania Secretary of Banking was responsible to the State Court in which he had filed his certificate of possession pursuant to Pennsylvania law. Reference to the language of this Court in Gordon v. Washington quoted above shows that this point was but an incidental factor in its decision. The distinction drawn by the District Court is, therefore, without merit.

NO FACTS WERE ALLEGED OR PROVEN SHOWING WASTE OR DISSIPATION OF TRUST ASSETS.

The Bill of Complaint did not allege that the trust assets were being or would be wasted or dissipated. alleged that the assets of Independence were being or would be dissipated. It averred in paragraph 46 (Record p. 25) that as a result of the adverse, detrimental and injurious publicity occasioned by the proceedings of the Securities Commission, the funds, assets and property of Independence would be dissipated, depleted and wasted. The Complainants contend in their brief that the sale of the seven underlying stocks in the Independence trust was a dissipation of the trust assets. This is not the fact. These seven stocks were eliminated from the portfolio under the power granted to Independence under Independence Trust Agreement to eliminate the stocks which had become or were likely to become impaired in value. was, therefore, definitely contemplated by the terms of the

trust that it might become necessary to eliminate stocks at depressed prices. The elimination of stocks at a loss was obviously contemplated. The District Court found that there had been no abuse of discretion on the part of investment counsel or of Independence in this elimination (Record p. 361), so that there could be no dissipation in the sense that the sales were wrongful or improper.

Independence did not receive any of the proceeds of sale except to the extent that it may have been the registered holder of Independence Trust Shares as of the last distribution date. There was no diversion of proceeds of sale to persons not entitled to receive their pro rata share. On April-1, 1938 The Pennsylvania Company as Trustee of the Independence Trust distributed to The Pennsylvania Company, as Trustee of the Capital Trust, the proportion of the proceeds of the sale applicable to the trust shares held for the holders of the Capital Trust Certificates. This money was invested in additional trust shares in accordance with the Contract Certificates and the Capital Trust Agreement, excepting that there was deducted and held in the hands of the Trustee the amount of money which represented the mark up which Independence was entitled to receive under the terms of the Capital Trust Agreement.

The case at bar is entirely different from such cases as Merchants' National Bank v. Chattanooga Construction Company, 53 F. 314 (C. C. E. D. Tenn., 1892), cited by the Complainants in their brief, where the officers of the defendant corporation were conspiring to strip it of its assets and were pledging bonds owned by it for debts of others.

EACH BENEFICIARY MAY AT ANY TIME RECEIVTHIS TRUST PROPERTY OR THE LIQUIDATING VALUE THEREOF.

The Complaint admits that each Capital Contract Certificateholder may at any time demand and receive from The Pennsylvania Company his Independence Trust Shares or the liquidating value thereof. (Record p. 11.) This right is specifically provided for in the Capital Trust Agreement. (Section 5, Appendix p. 8.) If he elects to receive his trust shares he may either hold them as an investment, sell them, or exercise his rights of withdrawal under the Independence Trust Agreement. (Sections II, III, IV, V and VI, Appendix, pp. 61-63.) The Complaint also admits, which is the fact, that The Pennsylvania Company keeps an account for each Capital Contract Certificateholder showing the exact amount of Independence Trust Shares and fractions held for him at any one time. (Record p. 11.)

As this Court held in Gordon v. Washington, supra, a receivership is not an end in itself. It is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. There is no occasion for the appointment of a receiver of the trust under the theory of such cases as Case v. Beauregard, 101 U. S. 688 (1879), where it was held that a court in equity had the power to impress a trust on a fund in the hands of an unwilling trustee. The existence of the trusts are admitted and the terms of the trusts are in writing. There is no necessity for the intervention of a court in equity under the theory of such cases as Oelrichs v. Spain, 82 U. S. 211 (1872), which was a proceedings in equity to determine the respective rights of claimants against a trust fund. In our case the rights of the beneficiaries in the trust funds are fixed and determined,

and no court proceedings are necessary to determine their respective rights. Finally, there is no necessity for a court in equity to set aside the trusts for fraud or for any other reason, because it is admitted the Trustee will, at any time, permit any beneficiary to revoke the trust as to himself and will deliver his trust property or the liquidating value thereof on demand. The cases cited by the Complainants relate to adverse proceedings by a defrauded grantor against a trustee contending the trust is irrevocable.

The contention of the Complainants that the trusts are fraudulent per se is without any basis. They certainly do not seriously contend that the Independence Trust, which creates a fixed investment trust in the accepted form is fraudulent. Neither is there anything inherently fraudulent in the Capital Trust. The charges may be heavy, but it cannot be said that they are fraudulent if they are fully disclosed to prospective Contract Certificateholders, as required by the Securities Act, at the time of sale. The fraud alleged is in sales methods, but this does not result in the Capital Contract Certificates or the trusts being fraudulent per se.

THE TERMINATION OF THE TRUSTS WOULD CONSTITUTE A BREACH OF THE TERMS OF THE TRUSTS.

The Complaint prays not only that the receiver to be appointed for Independence take over the trust assets but also that the trusts be dissolved and the trust assets distributed. The Independence Trust Agreement originally provided that The Pennsylvania Company was to hold the trust assets until 1950, subject only to the exercise of the

right of withdrawal, and by the Third Supplemental Agreement the termination of the trust is extended to 1970. A termination of the Independence trust by the court through a receiver would, therefore, be a direct violation of the very terms of this trust agreement.

Under the Capital Trust Agreement neither The Pennsylvania Company, as Trustee, nor Independence has the right to terminate any Contract Certificate unless the Contract Certificateholder is in default in the payment of his monthly payments for a period of six months. (Section 6, Appendix pp. 8-9.) Furthermore, after a Contract Certificateholder has completed all of his payments, and there are a great number of such cases, he may require The Pennsylvania Company, as Trustee, to hold his trust shares for him for another ten years. (Section 4, Appendix p. 6.) The termination of the Capital Trust and the distribution of its assets would, therefore, violate the terms of the Capital Trust Agreement and the Contract Certificates.

As this Court stated in Gordon v. Washington, supra, a receivership is only a means to some legitimate end. The termination of the trusts contrary to their explicit terms, and the violation of the rights of the beneficiaries, far from being a legitimate end which should appeal to a court of equity, is actually an illegal and unauthorized end.

The appointment of a receiver for the trust assets would breach other important provisions of the Capital Trust Agreement. Although it is usual to provide in trust agreements and trust indentures for the resignation or removal of a corporate trustee, it will be noted that the Capital Trust Agreement is novel in this respect. The Pennsylvania Company cannot resign and cannot be removed from its trusteeship with respect to any Contract Certificate

which is at the time outstanding. (Section 1, Appendix p. 18.) The purpose of this provision was to assure the Contract Certificateholders that their trust shares would at all times be in the custody of and be administered by a responsible bank well known in the community. These novel provisions were inserted in the trust agreement after careful consideration for the protection of the Contract Certificateholders and no court of equity should disregard them and violate them in the absence of very impelling reasons. These provisions are entirely fair. The Contract Certificateholders are not wedded to The Pennsylvania Company because they can at any time withdraw and part company with their trustee. But they are entitled to have the provisions of their contract carried out and there would be no warrant to appoint a successor trustee at the instance of a mere handful of Contract Certificateholders without their consent. These proceedings have created a great deal of, uneasiness among the Contract Certificateholders. The last thing that a great many of them desire is that The Pennsylvania Company should be supplanted by a receiver.

A RECEIVER WOULD HINDER THE BENEFICI-ARIES IN EXERCISING THE RIGHTS GRANTED TO THEM UNDER THE TRUST AGREEMENTS.

The first effect of a receivership of the trust assets, would be to prevent the holders of Contract Certificates and the holders of Independence Trust Shares from receiving their trust property or the liquidating value thereon on demand because a receiver would not be free to act without orders of court. Instead of communicating with the office of the trustee to exercise their rights, the beneficiaries of these trusts would be put to the expense of employing

counsel to file the necessary petitions and to obtain orders of the court thereon. Another result of a receivership would be that the Contract Certificateholders who desired to continue their payments would not be permitted to do so because the trust would be terminated. A further result of the receivership would be that the holders of Independence Trust Shares who had purchased them as an investment would have their property liquidated and paid to them in cash against their desires. Furthermore, if a receiver were appointed, the market for Independent Trust Shares would be non-existent, and if the market prices of the underlying stocks declined thousands of dollars might be lost.

THE RECEIVERSHIP WOULD RESULT IN A, VERY LARGE AND WHOLLY UNNECESSARY EXPENSE.

The accounting problems of any receivership would be enormous. The Pennsylvania Company is now able to administer the Capital Trust by the use of expensive accounting machines and is able to pay its clerical force from the trustee fees which are taken from the payments. If a receiver is appointed for the purpose of winding up the trusts all payments will stop and the work of the accountants and the receiver's clerks will involve a mass of small items with the resultant large expenses.

At the present time, except in the case of Contract Certificates which are fully paid, the Trustee receives nothing for services or expenses excepting out of payments which are made. Nothing is charged to a Contract Certificate-holder who discontinues his payments before he had completed them, and unless and until The Pennsylvania Com-

pany or Independence terminates his Contract Certificate for default, The Pennsylvania Company holds his trust shares and reinvests his distributions without any charge whatsoever.

Not only would the ordinary expenses of administering the receivership and of making distributions entail very large expense, but on the theory of the prayers of Complaint a complete accounting and marshalling would have to be made of all claims. There is no question of marshalling claims in this case, because the trust assets belonging to one Contract Certificateholder cannot be applied to the claim of another Contract Certificateholder against Independence, but if it were ever attempted, the accounting expenses would run into thousands of dollars and consume months of work.

THE PRINCIPAL BENEFICIARIES OF THE RECEIVER AND HIS COUNSEL.

Who, then, would benefit by a receivership of the trust assets? Certainly not the Contract Certificateholders because they are not charged anything for the trust administration except when they make a payment, and in that case, they pay a moderate fee at the rate of 25¢ for each \$10.00 payment for the services of The Pennsylvania Company in purchasing their trust shares, keeping them in its custody, keeping of their individual accounts and reinvesting of their distributions. Furthermore, they are free to withdraw from the trust at any time and demand and receive their trust assets or the liquidating value thereof.

The principal beneficiaries of the receivership would be the receiver and his counsel. The value of the trust assets held by The Pennsylvania Company exceeds \$3,000,000. The semi-annual income on the securities held in trust amounts to many thousands of dollars. It is well known that the fees of the receivers and his counsel in any receivership involving any such sums are never moderate. The accepted practice is to take the value of assets involved into account in fixing such fees and there is no reason to believe that the fees of a receiver and of his counsel in any such case as this would not amount to many thousands of dollars, all paid out of the assets belonging to the beneficiaries who the Complainants allege have already been victimized by excessive charges.

Unnecessary receiverships entailing unnecessary expenses and large fees have been justly criticized. If a receiver were appointed for the trust assets in these proceedings it would be another case justifying like criticism.

CONCLUSION.

The District Court had no jurisdiction of The Pennsylvania Company in this case under the Judicial Code nor under the Securities Act and the Circuit Court correctly held that it was not a proper party to the proceedings. There is no legitimate end which a receivership of the trust assets would serve. The trust assets are in the hands of a responsible trustee who is carrying out its trust in accordance with the terms of the trust agreements. The trust assets belonging to Contract Certificateholders cannot be taken from them to satisfy claims of other Contract Certificateholders against Independence. The only result of a receivership would be large and unjustified expenses paid

out of the assets belonging to the Contract Certificateholders who the Complainants allege have already been victimized by excessive charges.

· Respectfully submitted,

WALTER BIDDLE SAUL, FRANCIS H. BOHLEN, JR.,

Attorneys for The Pennsylvania Company for Insurances on Lives and Granting Annuities, Respondent.

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FILED OCT 11 1940 ARLES ELMORE GROPLEY

Supreme Court of the United States

October Term, 1940.

No.48.

ROBERT J. DECKERT, ROWLAND W. RANDAL, DAVID W. COMPTON, et al.,

Petitioners.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES.

APPENDIX

To Brief of The Pennsylvania Company for Insurances on Lives and Granting Annuities, Respondent.

> WALTER BIDDLE SAUL, Counsel for Respondent.

2301 Packard Building. Philadelphia, Pa.

Eastern Bank Note Co., Phila., Pa

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Appendix.

TRUST AGREEMENT.

AGREEMENT dated as of May 1, 1934, by and between Capital Savings Plan, Inc., a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called the "Company"), party of the first part, The Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation organized and existing under the laws of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part; and Those Persons who from time to time become partics hereto by purchasing Contract Certificates of Capital Savings Plan, Inc. hereinafter referred to and described (such persons being hereinafter called "Investors"), parties of the third part;

Whereas, the Company has full power and authority to execute and to sell from time to time Contract Certificates upon an instalment basis, with or with insurance protection and/or full paid Certificates, of the form and tenor attached hereto and made a part hereof as Exhibits "A" and "B", together with such other Contract Certificates as from time to time may be necessary or desirable upon the adoption by resolution of the directors of the Company and the approval of the Trustee; and

Whereas pursuant to the terms of said Contract Certificates and to the extent therein provided, the Trustee will purchase for the Investors Independence Trust Shares, or, upon substitution by the Company, as hereinafter provided, other trust shares or receipts of banks, trust companies or banking institutions or certificates of deposit or of interest or of participation evidencing deposit of, or representing blocks of, underlying securities reasonably comparable to the securities underlying Independence Trust Shares (hereinafter called "Trusteed Property"); and

Whereas, the Trustee has agreed and does hereby agree, in accordance with the terms of said Contract Certificates to hold in trust the Trusteed Property so purchased by it from time to time for the Investor's until maturity of any Contract Certificate or earlier termination thereof, as hereinafter provided; and

WHEREAS, the Company and the Trustee have authority to execute and deliver this Trust Agreement and have duly authorized the execution and delivery thereof,

Now, Therefore, in consideration of the premises and of the mutual covenants herein contained, and the payments to be made by the Investors, and, in order to declare all terms and conditions relating to the Trusteed Property and to the holding thereof in Trust by the Trustee, the parties hereto, each for itself and himself and not on behalf of any other party, agree each with the other as follows:

ARTICLE I.

DESCRIPTION OF CONTRACT CERTIFICATES.

1. The Contract Certificates shall be issued by the Company without limit, from time to time as the Company shall determine. Every Certificate shall bear the date of the day of the month on which such Contract Certificate is issued. The issuance of all Contract Certificates shall cease ten years prior to the termination of a Deed of Trust dated April 2, 1930 entered into by and between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, or ten years prior to the termination of any extension thereof; provided, however, that in the event a substitution of Trusteed Property be effected under Article VI hereof, the issuance of Contract Certificates shall cease ten years prior to the termination of such Deed or Deeds of Trust, or any extension or extensions thereof, securing such substituted Trusteed Property. All Contract Certificates (excepting

Half Contract Certificates which shall provide for total payments of \$600 and monthly payments of \$5.) shall provide for the payment by the Investor of the sum of \$1,200 or multiples thereof to the Trustee either (a) in instalments of \$10 per month or multiples thereof, for a period of tenyears, payable on or before the same day of each month as the original date of the Contract Certificate, or (b) in one lump sum payment, and in the case of (a) may be accome panied by insurance on the life of the Investor, as hereinafter provided. The form of Contract Certificates shall be substantially the same as set forth in Exhibits "A" and "B'cherete attached. Contract Certificates shall be executed on behalf of the Company by the engraved or lithographed facsimile signature of its President, and the corporate seal thereunto attached, duly attested by the Secretary of the Company or any Assistant Secretary. No Contract Certificate shall be valid or obligatory for any purpose nor be entitled to any right or benefit under this Trust Agreement, unless and until the certificate of authentication and registration thereon endorsed shall have been executed by the Trustee through one of its authorized officers.

2. In case any of the officers of the Company who shall have executed any Contract Certificate issuable under this Trust Agreement shall cease to be such officer before such Contract Certificate shall be actually authenticated and delivered by the Trustee, such Contract Certificates shall nevertheless bind the Company as though the person who had executed the same had not ceased to be such officer of the Company, and the Company may adopt and use for the purpose of executing any Contract Certificate the engraved or lithographed facsimile signature of any person who shall have been President of the Company, notwithstanding the fact that he may not have been such President at the date of such Contract Certificate or that he may have ceased to be such President when such Contract Certificate is actually authenticated and delivered.

- 3. All Contract Certificates shall be registered upon the books of the Company, to be kept by the Trustee at its principal office, and the Trustee shall also keep a record of the address of each Investor and of all payments made by him under his Contract Certificate and of all additional credits and/or charges against such Investor's account. The Trustee shall send all notices to the Investors required by this Trust Agreement and any notice so required shall be sufficiently delivered if placed in the United States Mail by the Trustee with sufficient postage attached and addressed to the Investor at his address, as the same is recorded upon the books of the Trustee.
- 4. All Contract Certificates sold by the Company after May 16, 1934 shall be issued under the terms of this Trust Agreement and the entire issue of which each Contract Certificate is a part, shall be sold only to persons resident within the State of Pennsylvania.
- 5. All books pertaining to each Investor's account will be maintained and kept by the Trustee at its principal office in the City of Philadelphia, State of Pennsylvania. Monthly audite of the Trustee's books of account and records will be made for and at the expense of the Company by Messrs. Lybrand, Ross Bros. & Montgomery, or other certified public accountants duly licensed by the State of Pennsylvania, satisfactory to the Trustee and to the Company.

ARTICLE II.

OBLIGATIONS AND RIGHTS OF THE INVESTOR.

1. The Investor shall become a party to this Trust Agreement by becoming the purchaser of a Contract Certificate and shall make the payments to the Trustee called for by his Contract Certificate at the times and at the place set forth therein, without notice by the Trustee or the Company as to any instalment other than as set forth in the Contract Certificate. The Trustee, upon receipt of each payment, shall, provided such shares be available for pur-

chase, apply the same, less the deductions hereinafter provided for, not later than twenty days from the day on which such payment is made to the purchase at current market prices of Independence Trust Shares issued under an Agreement and Declaration of Trust between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, dated as of April 2, 1930, or such other Trust Shares as the Company, as hereinafter in Article VI provided, may substitute for Independence Trust Shares. All Independence Trust Shares (or substituted Trust Shares) so purchased shall be registered in the name of the Trustee or its nominee. The Trustee shall not be required to receipt to the Investor for any monthly payment made by him. The Trustee shall deduct from the monthly instalments received by the Trustee from the Investor, to cover all legal, administrative and collection expenses and the cost of life insurance in the case of a Contract Certificate accompanied by life insurance, the following: (a) from each monthly instalment paid, a sum not in excess of Twenty Five Cents (\$.25) for each \$10 payment or fraction thereof, which shall be retained by the Trustee to provide for the expense of administering the Trust hereby created, including the compensation of the Trustee; (b) from each monthly instalment paid on a Contract Certificate accompanied by life insurance, a sum sufficient to discharge the insurance premiums as they become due, which the Trustee shall pay as agent for the Company to the Insurance Company; (c) from the first twelve monthly instalments paid, a sum in the aggregate not in excess of the rate of Sixty Dollars (\$60.00) for each Twelve Hundred Dollars (\$1200) agreed to be paid in on each Contract Certificate which shall be paid by the Trustee to the Company to be retained by the Company as its full service charge for the entire period during which the Contract Certificate shall continue in force, said service charge to be deducted from

all or any such instalments in such proportion as the Company shall from time in writing direct. The balance if any

remaining in the hands of the Trustee from each monthly instalment, after making the deductions hereinabove provided for, shall be invested by the Trustee in "Trusteed Property" for the account of the Investor. The Company shall in no event be liable or accountable to the Trustee or to the Investor, nor shall the Investor have any right to, nor shall the Company be obligated for the repayment to the Investor of any part of the sums so paid to the Company bereunder.

- 2. The Trustee shall hold in its name as Trustee all Trusteed Property purchased by it, in Trust, for each of the several Investors in the proportions to which they may be respectively entitled, pursuant to the terms of this Trust Agreement and the Contract Certificates.
- 3. The Trustee shall collect all payments, dividends and/or distributions from time to time made upon the Trusteed Property, and shall; within twenty days of receipt thereof, apply the same to the purchase of available additional Trusteed Property and likewise hold the same in trust for the several Investors.
- 4. Upon completion of the instalments payable by any Investor holding a Contract Certificate in the form hereto attached and marked Exhibit "A" or "B" or upon the maturity of a full paid Contract Certificate as hereinafter set forth, the Trustee shall notify the Investor in writing of the completion of such payments, and thereupon such Investor may, upon surrender to the Trustee of his Contract Certificate, exercise any one of the following options: (a) Direct the Trustee to deliver to the Investor the portion of the Trusteed Property to which he is entitled; or (b) direct the Trustee to sell at current market prices the portion of Trusteed property to which he is entitled and pay over the proceeds thereof; or (c) direct the Trustee, in writing, to hold the portion of Trusteed Property to which he is entitled for a period of ten years from the date of such completion, in Trust, for the account of the Investor- During

such extended period, the Trustee shall collect all payments, dividends and/or distributions from time to time made upon the Trusteed Property and all other obligations and rights of the Company, the Trustee and the Investor shall continue and be the same as they were prior to the exercise of such option by the Investor. At the end of such extended period, the Trustee shall notify the Investor, in writing, of such fact, and thereupon the Investor shall have either of the other options herein set forth.

During each year of such extended period, the Trustee shall be entitled to deduct from all payments, dividends and/or distributions from time to time made upon the Trusteed Property a sum not in excess of two-tenths of one per cent (2/10 of 1%) per annum of the total amount paid in on such Contract Certificate as its charge and compensation for the expense of administering the Trust during

such period.

Any Investor, upon the completion of the payments payable under his Contract Certificate and upon the exercise of this option (c), shall be entitled to the option provided in Section 9 of this Article II of this Trust Agreement.

Upon the exercise either of option (a) or (b) by any Investor, the Trustee shall, within a period of ten days from receipt of notice thereof, proceed (a) to obtain transfer of the Trusteed Property to which such Investor may be entitled into his name or the name of his nominee and to make delivery of the same; or (b) to sell the proportion of the Trusteed Property to which the Investor is entitled at current market prices and to pay over the proceeds thereof to the Investor or his assignee. Any fraction of a share of Trusteed Property to which the Investor shall be entitled shall be sold at current market prices and the proceeds paid in cash by the Trustee.

Payment of the necessary transfer stamps or other transfer charges required to be paid by the Trustee, shall be made to the Trustee by the Investor or shall be deducted

by the Trustee from the proceeds due to the Investor upon the exercise of any option by any Investor who shall have completed all instalment payments.

- 5. Anything to the contrary herein notwithstanding, any Investor shall have the absolute right to terminate his Contract Certificate at any time whatsoever, and in such event and upon surrender of his Contract Certificate to the Trustee shall thereupon become entitled to exercise either option (a) or (b) as specified in Section 4 of this Article II above set forth, with respect to so much of the Trusteed Property as he may be entitled to at the time of such withdrawal.
- 6. Any Investor who shall default in the payment of any instalment when due shall be considered as having terminated his Contract Certificate and shall be bound by the provisions of Section 5 of this Article II; provided that, in case of termination by default and neither option shall have been exercised by the defaulting Investor, he may within a period of six months from the due date of the first payment defaulted upon, reinstate his Contract Certificate upon the payment to the Trustee of all unpaid instalments, but life insurance, if any, shall not be reinstated until approved by the Insurance Company.

Upon reinstatement, the Trustee shall within twenty days thereafter apply the sums paid by the Investor, less the payments to the Company if any are then due and unpaid, the deductions for the Trustee and deductions for the payment of the insurance premiums on Contract Certificates accompanied by life insurance, to the purchase of Trusteed Property at the then current market prices.

Upon default, as herein set forth, and until the exercise by the Investor of either option or reinstatement of his Contract Certificate, the Trustee shall for a period of six months from date of default continue to hold the share of the defaulting Investor in the Trusteed Property, in addition to any payments, dividends and/or distributions made

upon such share of Trusteed Property during the period of default, for his account. After six months from date of default the Trustee may, without notice to the Investor, sell at current market prices the share of the defaulting Investor in the Trusteed Property, and thereafter hold the proceeds for his account and pay the same to such Investor upon demand therefor, accompanied by surrender of his Contract Certificate. Such payment shall constitute a complete discharge to the Trustee and the Company and the interest of the Investor in the Trusteed Property and all rights under his Contract Certificate shall thereupon cease.

- 7. Any Investor who shall not be in default with respect to any payments due and owing under the terms of his Contract Certificate may give written notice to the Trustee of his desire to accept delivery of the Trusteed Property, or any part thereof, which up to that time has been purchased for his benefit and in such event and upon payment to the Trustee of \$2.00 to be retained by it as its fee for complying with said notice and in addition the amount required for necessary transfer stamps and other transfer charges required to be paid by the Trustee, the Trustee shall proceed to obtain transfer of said Trusteed Property into his name, or into the name of his nominee, and to make delivery of the same, provided, however, that the Trustee shall retain any fractional shares as Trusteed Property for the benefit of the Investor. Thereafter the Investor shall continue his payments in accordance with his Contract Certificate and the Trustee shall invest the same less deductions, in Trusteed Property under the terms of this Trust Agreement as though the Investor had not withdrawn any part of the Trusteed Property: Before any Investor shall be entitled to receive any Trusteed Property under this provision, he shall be required to surrender his Contract Certificate to the Trustee for the purpose of noting thereon delivery of Trusteed Property to him.
- 8. In case of a Full Paid Contract Certificate, the Trustee shall execute the "Full Paid" endorsement thereon and

shall forthwith apply the payment made thereon (less a sum not in excess of two and one-half per cent (21/2%) of the total amount paid in on such Contract Certificate to be paid by the Trustee to the Company as its full service charge for the entire period during which the Contract Certificate shall continue in force; provided, however, in the event an instalment Contract Certificate is converted into a full paid Contract Certificate pursuant to the terms of this Trust Agreement, the Investor shall be entitled to a credit for but shall not be entitled to be reimbursed for, any deductions made previous thereto, pursuant to the terms of Section 1 of this Article II) to the purchase of Trusteed Property, and shall continue to hold the same for the benefit of the Investor owning such full paid Contract Certificate. All distributions upon the Trusteed Property applicable to such full paid Contract Certificate shall be collected by the Trustee and applied to the purchase of additional Trusteed Property until maturity of such full paid Contract Certificate (which shall be ten years from the date thereof) or earlier termination thereof. From and after the date at which a Contract Certificate shall be full paid the Trustee shall deduct from all payments, dividends and/or distributions from time to time made upon such Trusteed Property, a sum not in excess of two-terces of one per cent (2/10 of 1%) per annum of the total amount paid in on such Contract Certificate as its charge and compensation for the expense of administering the Trust during the time that said Full Paid Contract Certificate shall continue in force in lieuof, but in addition to, the deductions if any theretofore made for the account of the Trustee under the provisions of Article II, Section 1 (a). Any Investor may at any time convert an instalment Contract Certificate into a full paid Contract Certificate by paying to the Trustee the aggregate of all remaining unpaid instalments due thereon.

9. Any Investor holding a Full Paid Contract Certificate shall have the right at his option to direct the Trustee, in writing to pay over to such Investor all or any part of the cash distribution from time to time made to the Trustee upon the Trusteed Property, and thereupon the Trustee shall forthwith pay over such sums so directed to be paid to the Investor. After receipt of such notice, the Trustee shall continue to make such payments to the Investor as and when such cash is received by the Trustee as distribution upon the Trusteed Property until such time as the Investor shall, in writing notify the Trustee to discontinue such payments. The Investor shall have no right to direct the Trustee to pay over to him any distributions made to the Trustee upon the Trusteed Property other than those made in cash.

In the event the Investor exercises the option provided in this Section 9, or has exercised option (c) provided for in Section 4 hereof, the Trustee shall have the right, before making such payment, to first deduct the two-tenths of one per cent (2/10 of 1%) per annum of the total amount paid in on such Contract Certificate which may be then due for its charge and compensation for the expense of administering the trust during such period.

- 10. The Company may adopt for execution by Investors a uniform Declaration of Trust, the form and provisions of which shall be satisfactory to the Trustee, providing, inter alia, that the Investor holds all his right, title and interest in the Trusteed Property mentioned in his Contract Certificate in trust for a certain named beneficiary but reserves the right to revoke the trust without such beneficiary's consent. Such uniform Declaration of Trust shall contain such other terms and conditions as shall be satisfactory to the Trustee, but the form thereof in use may be changed from time to time at the option of the Company provided the changes are satisfactory to the Trustee.
- 11. Any Investor may, upon or after the issuance to him of a Contract Certificate, execute and file with the Company a writing in form satisfactory to the Company, authorizing the Company to cause such Investor's Contract Certificate to be liquidated by the Trustee when the Trus-

teed Property to which the said Investor is entitled has attained a net market value of Two Thousand Dollars (\$2,000) in relation to each Twelve Hundred Dollars (\$1,200) agreed to be paid in on said Certificate by said Investor. Upon the execution and filing with it of such authorization of liquidation, the Company shall, when and as said net market value has been attained, notify the Trustee to sell the Trusteed Property to which the said Investor is entitled and to pay over to the said Investor the entire net proceeds of such sale upon the surrender to the Trustee by the Investor of the Contract Certificate so liquidated. Upon such liquidation the Company shall forthwith give written notice thereof to the Investor. Any such authorization of liquidation may be revoked by the Investor at any time before such liquidation has been effected by the giving to the Company by the Investor of written notice of the said Investor's desire to effect such revocation, and shall be revoked by any earlier termination of the Contract Certificate under any of the provisions of this Trust Agreement.

12. In case any Investor shall fail or neglect to exerkise any option he may be entitled to exercise under this Trust Agreement (a) upon the maturity of his instalment Contract Certificate, or at the expiration of the extended period of his instalment Contract Certificate, or (b) upon the expiration of the period provided in any Full Paid Contract Certificate, or (c) upon the termination of any Contract Certificate in any manner or for any cause provided in said Frust Agreement, the Trustee may give such Investor notice that unless he exercises one of the options he is then entitled to exercise within thirty days from the date of said notice, the Trustee will exercise on his behalf option (b) as provided in Section 4 of this Article. Unless such Investor shall within said thirty day period elect to exercise one of the options he is then entitled to exercise under this Trust Agreement, the Trustee shall exercise said option (b) on his behalf and shall hold the net proceeds of the Trusteed Property sold for the Investor

without interest to be paid over to him upon the surrender of his Contract Certificate. Such payment shall constitute a complete discharge to the Trustee and the Company and the interest of the Investor in the Trusteed Property and all rights under his Contract Certificate shall thereupon cease. Unless the Trustee shall give such notice to the Investor, the Trustee shall continue to hold the Trusteed Property for the Investor, applying all distribution thereon collected by the Trustee to the purchase of additional Trusteed Property, or if directed by the Investor pursuant to Section 9 of this Article, paying over to the Investor cash distributions collected by the Trustee. Until the Trustee shall have given such notice, any Invester may exercise any option he is entitled to exercise under this Trust Agreement no matter how long he may have delayed, and likewise, the Trustee may delay the giving of said notice to Investor until such time as it may elect, so long as the Investor in the meantime has not exercised an option.

ARTICLE III.

CONCERNING INSURANCE ON THE LIVES OF INVESTORS.

The Company has arranged for life insurance upon the life of any Investor holding a Contract Certificate in the form attached hereto and marked Exhibit "A", under a blanket life insurance policy, during the terms of such Contract Certificate, or for a period of sixty days after any default by the Investor, provided the Investor be in good health and acceptable at the time of the execution of his Contract Certificate. Said policy provides that, subject to that limitation and to the terms, conditions and privileges set forth in said policy, upon receipt of due proof of death of the contract holder occurring while said policy is in force and while insured thereunder, the Insurance Ompany issuing such policy will pay to the Trustee the amount equal to the difference between the total amount of payments to be made by the contract holder under the terms of his Con-

tract Certificate and the amount which the contract holder has paid thereunder, but in no event in excess of Nine Thousand, Six Hundred Dollars (\$9,600). All policies of insurance shall be held by the Trustee and shall be payable to the Trustee and the premiums shall be paid by the Trustee, all as agent for the Company, but only when and as payments are made to the Trustee by the Investors or by someone on their behalf, in accordance with the terms of their Contract Certificates. The Trustee shall deduct from the payments made by the Investor holding a certificate accompanied by life insurance an amount for premiums for the account of the Company and pay the same as agent for the Company to the Insurance Company or Companies. The benefits of any life insurance policy will not be available to the Trustee or the Company if (a) the holder of the Contract Certificate shall commit suicide while either sane or insane within two years from the date of the Contract Certificate or (b) the holder of the Contract Certificate shall die while more than sixty days in default under his Contract Certificate, or (c) the holder of the Contract Certificate has made any material misstatements in his application for his Certificate, which application is to be a part of the Contract Certificate as though actually attached thereto.

In case of the death of any Investor and receipt by the Trustee of the proceeds of the policy of life insurance under which the life of such Investor is insured, the Trustee shall within twenty days, apply such proceeds, with no further deductions, to the purchase of Trusteed Property at current market prices and the Contract Certificate of the deceased Investor shall thereupon become full paid and all rights thereunder shall pass to the duly qualified personal representative or representatives of the deceased Investor or to the then Trustee under any outstanding and unrevoked Declaration of Trust.

ARTICLE IV.

CONCERNING THE TRUSTEE.

- 1. The Fustee shall not be in any way liable or responsible for anything done or omitted to be done by the Trustee hereunder in good faith, or for or in respect of any matter or thing in connection with this Trust Agreement, or with the Trusteed Property, except for the failure to exercise due care in the safekeeping and delivery of the Trusteed Property, or the proceeds thereof, as herein provided.
- 2. The Trustee does not assume or incur any liability, duty or obligations (other than as expressly provided for herein and in the Contract Certificates of the Company) to any Investor or to the Company, and the Trustee shall in no event be liable to any Investor or to the Company if, by reason of any present or future law of the United States of America or of any state thereof, this Trust Agreement or anything herein contained shall be declared invalid, or if for any cause not within its reasonable control the Trustee shall be in any way hindered, prevented or restrained from doing or perform by the terms of this Trust Agreement and/or the Contract Certificates.
- 3. The Trustee shall not be under any obligation to take any action toward the execution of any of the provisions of this Trust Agreement except its own covenants, or to appear in, prosecute or defend any action, which action in its opinion may involve it in expense or liability, or sue for or collect the proceeds of any insurance policy, unless, as often as required by the Trustee, it shall, after requests to the Company and/or the Investor, be furnished with reasonable security and indemnity against such expense or liability.
 - 4. The Trustee may employ agents or attorneys-in-fact and shall not be answerable for the default or misconduct of any such agent or attorney if such agent or attorney shall

have been selected with reasonable care, and the Trustee shall be fully protected in respect of any action under this Trust Agreement taken or suffered in good faith by the Trustee in accordance with the opinion of its counsel and in acting upon any resolution, vote, declaration, request, demand, order, notice, waiver, appointment, consent, certificate, affidavit, statement or market report or upon any other paper or document believed by it to be genuine, and to have been passed, signed, executed, acknowledged, verified, published or delivered by the proper party.

- 5. For proof of any fact, the Trustee may rely on a certificate with respect thereto signed by any two of the following officers, to wit: the President, a Vice-President, the Treasurer, the Secretary or an Assistant Secretary of the Company, and the Company may rely on a certificate with respect to any fact which has been signed by any two of the following officers, to wit: the President, a Vice-President, the Treasurer, the Secretary or an Assistant Secretary of the Trustee.
- 6. The person in whose name a Contract Certificate shall be registered shall for all purposes be deemed and regarded as the owner thereof and the Trustee shall not be affected by any notice to the contrary. In regard to distributing the share of the Trusteed Property and/or cash to which the Investor may be entitled or the proceeds of such Trusteed Property, the Trustee, without liability on its part, shall be entitled to rely upon the orders received from the person in whose name such Contract Certificate is registered as to the distributions thereof.
- 7. The Trustee shall hold all moneys or Trusteed Property received by it hereunder and may deposit the same in its banking department until required to disburse same in accordance with the provisions of this Trust Agreement and the Contract Certificates; and the requirements and benefits of any rule of law or statute now or hereafter in force regarding the investment or segregation of trust

funds are hereby waived with respect to such moneys or Trusteed Property. Nothing herein contained shall be deemed to require the Trustee to hold any part of the Trusteed Property for any particular Investor or to segregate the proportionate interest of any Investor in the Trusteed Property until Contract Certificates therefor shall be surrendered to the Trustee for cancellation.

- 8. All Trusteed Property purchased by The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee or otherwise for the Investor, pursuant to the terms of this Trust Agreement or of the Contract Certificate or of any instructions received from the Investors, pursuant to any provision hereof, shall be purchased through such dealer or dealers in securities as shall be designated by the Company and approved by the Trustee and the Trustee shall be absolutely protected and incur no liability of any kind by reason of the purchase or sale of the Trusteed Property through such dealer or dealers as shall be designated by the Company in respect to the price paid or received therefor. The Trustee under no circumstances shall be liable for any delay in the purchase of any Trusteed Property except for wilful default.
- 9. The Trustee shall not be responsible or liable for the placing of any Life Insurance or for the terms and conditions of any policy issued on the life of any Investor or the sufficiency or responsibility of the Insurer nor shall the Trustee in any event be responsible to any Investor or holder of a Contract Certificate by reason of any failure or inability of the Trustee to collect the proceeds of any policy of Life Insurance upon the death of any Investor.
- 10. The Trustee shall not be personally liable for any assessment made on the Trusteed Property held by it, or for any taxes or other governmental charges imposed upon the Trusteed Property, or upon the income therefrom, or upon it as Trustee hereunder, or upon the Contract Certificate which it or the Company may be required to pay

under any present or future law of the United States of America or of any state, county, municipality or other taxing authority therein, and if so required shall be entitled to reimburse itself from the dividends and/or distributions herein referred to, and/or from the Trusteed Property, and/or be reimbursed by the Investors and/or the Company, in the order named.

- 11. Any daty imposed upon the Trustee on or before a day certain shall, if such day certain falls on a Sunday or holiday, be considered as fulfilled if carried out on the next succeeding business day.
- 12. In the event that there is a substitution of Trusteed Property, as hereinafter in Article VI or Article VIII provided, the Trustee shall incur no liability to any Investor by reason thereof.

ARTICLE V.

RESIGNATION OR REMOVAL OF TRUSTEE.

endar months written notice to the Company and may be thereupon relieved from its obligations under this Trust Agreement with respect to any Contract Certificates issued after the effective date of such resignation by publishing a notice specifying a date when such resignation shall take effect, once a week for four successive calendar weeks (in each instance on any day or days of the week), in one daily newspaper published in the English language and of general circulation in the City of Philadelphia, State of Pennsylvania, the first publication in each newspaper to be made at least sixty days prior to the date specified in such notice on which such resignation shall take effect. Such resignation shall take effect on the day specified in such notice, unless prior to such date a successor trustee shall have been appointed as hereinafter provided.

Prior to the date specified by the Trustee in said notice when its resignation shall take effect, the Company by instrument executed and under its corporate seal, by order of its Board of Directors, and mailed to the Trustee at its principal office in the City of Philadelphia and State of Pennsylvania, shall appoint a successor trustee to fill any vacancy caused by the resignation of the Trustee, such instrument to be accompanied by a statement in writing by the successor Trustee so appointed accepting such appointment. After such appointment by the Company, the successor trustee shall forthwith cause notice of its appointment to be published at least once a week for two successive calendar weeks (in each instance upon any day or days of the week) in a daily newspaper published in the English language and of general circulation in said City of Philadelphia.

- 2. On written notice served upon the Trustee, the Company may remove the Trustee and/or any successor Trustee and the Trustee so removed shall have no obligations hereunder with respect to Contract Certificates issued after the effective date of such removal. The removal of the Trustee shall take effect on the day specified in the notice thereof, which day shall not be less than sixty days from the date of such service, unless previous to the date so fixed in any such notice a successor trustee shall have been appointed and shall have accepted such appointment in the manner hereinbefore provided, in which event such removal shall take effect immediately upon the appointment and acceptance by such successor trustee. Upon the removal of the Trustee the Company shall appoint a successor trustee and shall advertise such removal and appointment in the manner provided in Section 1 of this Article V.
- 3. Every Trustee hereunder shall be a bank or trust company organized and existing under the laws of one of the states of the United States, or a national banking institution incorporated under the laws of the United States, having trust powers and a capital and surplus of at least two million dollars.

Upon the appointment of any successor trustee, all rights, powers and duties of the Trustee hereunder with respect to all Contract Certificates issued after the effective date of such appointment shall immediately vest in the new trustee without any further act, conveyance or transfer. All fees and disbursements of the retiring trustee if any, other than those deductible as hereinbefore set forth from payments to be made by the Investors, shall be paid at or prior to the time of the delivery by it of the Trusteed Property.

- 4. Every appointment of a new trustee shall be in writing and executed in triplicate, one copy thereof being filed with the Company, one copy with the successor trustee, and one copy with the retiring trustee, which shall also receive a duplicate copy of the written acceptance of the successor.
- 5. Any company into which the Trustee may be merged or with which it may be consolidated, or any company resulting from any merger or consolidation to which the Trustee shall be a party, shall be the successor of the Trustee hereunder without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything to the contrary notwithstanding; provided, however, that such new company shall be qualified as hereinbefore provided.

ARTICLE VI.

SUBSTITUTION OF TRUSTEED PROPERTY.

Trustee, the Company may substitute for Independence Trust Shares or for any other substituted Trusteed Property shares of any investment trust having underlying securities of a standard nature and diversified in character, which said underlying securities are reasonably comparable to the securities underlying said Independence Trust Shares or, in case such shares are not available or the pur-

chase of the same is impracticable, receipts of banks, trust companies or banking institutions approved by the Trustee, or certificates of deposit or of interest or of participation issued by banks, trust companies or banking institutions approved by the Trustee evidencing deposit of, or representing blocks of underlying securities reasonably comparable to the securities underlying Independence Trust Shares in amounts or units reasonably comparable to the certificates for Independence Trust Shares if, in the judgment of the Company, such latter investment would be more beneficial to the Investor, provided that, if certificates representing Trust Shares of a similar nature to Independence Trust Shares or such receipts or certificates of deposit or of interest or of participation be purchased, they shall involve fees for issuance and deposit or percentage for distribution and profit no greater than those charged by Independence Shares Corporation at the time of such substitution. No such substitution may be made, however, until the Company shall have notified the Trustee in writing concerning the same, giving a reasonable description of the proposed substituted Trusteed Property, and unless the Company has, prior to such substitution, given to all Investors thirty days written notice of its desire to make such substitution, giving a reasonable description of the proposed substituted Trusteed Property and advising the Investors that if they do not desire the Trustee to accept such substituted Trusteed Property, they must, within thirty days from the date of such notice, surrender their Contract Certificates to the Trustee for withdrawal as provided herein. After the Company has given such notice to the Trustee and has also certified to the Trustee that it has given such thirty days notice to all Investors, the Trustee shall, after the expiration of such thirty day period, purchase for all Investors who have not withdrawn, the Trusteed Property so substituted. All Investors who do not surrender their Contract Certificates for withdrawal within said thirty day period shall be conclusively deemed to have consented to such substitution. The right of substitution herein given to the Company may be exercised by it from time to time and as often as may be necessary.

ARTICLE VII.

Powers and Immunities of the Company and Its Stockholders, Etc.

- 1. The Company may designate as dealers from whom Trusteed Property is to be purchased persons, firms and/or corporations who are, or any of the members of which are, officers, directors and/or stockholders in the company, or who may have a controlling interest therein directly or indirectly, and shall incur no liability to any Investor or to the Trustee by so doing.
- 2. Upon any substitution of any Trusteed Property, as hereinabove provided, such substituted Trusteed Property may be issued and provided by the Company itself or by any other corporation or firm owned or controlled by the Company, or by any of its officers, directors and/or stockholders directly or indirectly.
- 3. In the event that there is any substitution of Trusteed Property as hereinabove in Article VI or hereinafter in Article VIII provided, the Company shall incur no liability to any Investor or to the Trustee by reason of such substitution.
- 4. No recourse under or upon any obligation or agreement contained in this Trust Agreement or in the Contract Certificates shall be had against any incorporator, stockholder, officer or director, present or future, of the Company, or of any successor company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this Trust Agreement and the Contract Certificates are solely corporate obligations and

that no personal liability whatever shall attach to or be incurred by the incorporators or by any past, present or future stockholders, officers or directors of the Company or any successor company.

ARTICLE VIII.

- 1. In case one or more of the following events shall happen, that is to say, (1) if the Trustee resigns or is removed and the Company is unable to, or does not, procure a successor Trustee because of a refusal to accept the Trust hereby created; (2) if the Company shall, by written notice to the Trustee, declare this Trust Agreement terminated either forthwith or upon such date as may be set forth in such notice, not, however, exceeding sixty days from delivery thereof; (3) in any event, ten years prior to the termination of a Deed of Trust dated April 2, 1930, entered into by and between Independence Shares Corporation and The Pennsylvania Company for Insurances on Lives and Granting Annuities, or ten years prior to the termination of any extension thereof; provided, however, that, in the event a substitution of Trusteed Property be effected under Article VI of this Trust Agreement, ten years prior to the termination of such Deed or Deeds of Trust, or any extension or extensions thereof, securing such substituted Trusteed Property; then and in every such case this Trust Agreement shall be considered terminated and no more Contract Certificates shall be issued under the terms of this Trust Agreement, but no such termination shall affect the right of the Investor to continue his Contract Certificate to maturity in accordance with the terms thereof and of this Trust Agreement, if he so desires, without said continuance being affected in any way by such termination.
 - 2. If for any reason whatsoever Independence Trust Shares or any Trusteed Property substituted therefor shall cease to be available for purchase by the Trustee and the Company shall, for a period of sixty days after notice

thereof from the Trustee, fail or refuse to provide other Trust Shares, receipts or certificates of deposit or of interest or of participation, as hereinbefore in Article VI provided, then and in such event the Trustee will select for investment such shares, receipts or certificates of deposit or of interest or of participation as are available on the market which, in the opinion of the Trustee, represent blocks of underlying securities comparable to the securities underlying Independence Trust Shares and shall give notice to the Investor of such selection and, unless the Investor within thirty days thereafter advises the Trustee that he agrees to the substitution and purchase of such shares, receipts or certificates of deposit or of interest or of participation, the Contract Certificate shall be automatically terminated, subject to all of the provisions of this Trust Agreement with respect to termination as though a notice of termination had been filed by the Investor with the Trustee.

3. If for any reason Independence Trust Shares, or such other Trusteed Property as may have been substituted therefor in accordance with the provisions of this Trust Agreement, shall be available for purchase only at a price which the Trustee shall deem unreasonable, the Trustee may, but shall in no event be obligated to, give notice thereof to the Company, and within sixty (60) days after receipt of such notice the Company may substitute other Trust Shares or other securities in accordance with the provisions of Article VI hereof. If the Company shall fail to provide such substituted Trusteed Property within sixty (60) days after receipt of such notice, the Trustee may, but shall not be obligated to, select as substituted Trusteed Property hereunder such shares, receipts or certificates of deposit or of interest or of participation, as hereinabove in Article VI hereof described, as are available on the market, and which, in the opinion of the Trustee, represent blocks of underlying securities comparable to the securities underlying Independence Trust Shares, and shall give

notice to each Investor of such selection. If within thirty (30) days after such notice has been given by the Trustee the Investor shall advise the Trustee in writing of his consent thereto, the trust shares, receipts or certificates of deposit or of interest or of participation so selected by the Trustee shall be substituted as in the case of Trusteed Property substituted by the Company under the provisions of Article VI hereof. Unless the Trustee shall receive such written consent within thirty (30), days after notice of such substitution shall have been given, the Contract Certificate of the Investor so refusing or failing to consent shall be automatically terminated, subject to all of the provisions of this Trust Agreement with respect to termination, as though notice of termination had been filed by the Investor with the Trustee, but the Investor shall have no right to reinstate his Contract Certificate after such thirty (30) day period.

During the sixty (60) day period hereinabove referred to, or unless sooner notified by the Company of a substitution of Trusteed Property, the Trustee shall invest all payments received in Trusteed Property, notwithstanding such notice to the Company. During the thirty (30) day period hereinabove referred to, unless sooner notified by the Investor, of his agreement to such substitution, the Trustee shall not invest any payments received from any Investor in Trusteed Property, but shall hold the same for

the account of the Investor.

ARTICLE IX.

AMENDMENTS AND SUPPLEMENTAL AGREEMENTS.

1. The Company and the Trustee, without notice to or consent of the holders of Contract Certificates, are hereby authorized to join in the execution of any Supplemental Trust Agreement or Agreements and to make such Turther covenants and conditions therein in relation to this Trust Agreement not inconsistent with the general terms hereof as may be necessary or desirable to carry out the

intent and purposes of this Trust Agreement and the provisions of the Contract Certificates now issued, and to join in the execution of any amendment or amendments altering, changing, restricting or enlarging any and/or all of the provisions of this Trust Agreement; always provided, however, that no such alteration, change, restriction or enlargement shall affect the rights of the holders of Contract Certificates issued prior to the date of such alteration, change, restriction or enlargement.

ARTICLE X.

DEFINITIONS AND GENERAL PROVISIONS.

1. The term "Investor" and any reference thereto shall be taken to include the feminine as well as the masculine gender and shall also be taken to include the executors, administrators or other legal representatives of a deceased holder of the Contract Certificate.

The term "Trust Agreement" as used herein, shall include this Trust Agreement and every agreement supplemental thereto which may be entered into by the Company and the Trustee subsequent to the date hereof.

The term "Trustee" shall be construed to mean the Trustee hereunder for the time being, whether the original

Trustee or a successor.

The term "Company" shall be taken to mean Capital Savings Plan, Inc., organized and existing under the laws of the State of Pennsylvania, or any successor of such corporation formed pursuant to the reorganization, consolidation or merger of such corporation, and this Trust Agreement shall inure to the benefit of any and bind any such successor corporation.

The term "Trusteed Property" shall be taken to include Independence Trust Shares and/or any Trust Shares or receipts or certificates of deposit or of interest or of participation substituted therefor, as provided in Article VI and in Article VIII hereof, which may be purchased by

the Trustee and held by it under the terms of this Trust Agreement.

- 2. Notice of the election by any Investor of any option herein provided for shall be in writing and delivered to the Trustee before the same shall be considered as made and, when so delivered, shall constitute full and complete authority to the Trustee to carry out on behalf of the Investor the option elected by him.
 - 3. Any Contract Certificate, if in force and not cancelled on the books of the Trustee, may be assigned to any individual acceptable to the Company, but the Assignment or transfer thereof shall not be valid without the consent in writing endorsed thereon by the Company after proper application has been made and \$1.00 has been paid to the Company to be retained by it as its service fee, and the Assignee has endorsed thereon his acceptance of the terms of said Contract Certificate and the Company shall have duly notified the Trustee of its approval of said Assignment. From then and thereafter the Assignor-Investor shall be relieved and discharged of all obligations and duties under, and shall have no further rights or interests in, his Contract Certificate or this Trust Agreement, and the Assignee-Investor shall be deemed and taken to have become substituted in the place and stead of the Assignor-Investor. Upon such Assignment and consents, the insurance benefits, if any, in said Contract Certificate will terminate as to the investor but the said insurance benefits will be extended to the Assignee subject to the approval. of the Company, of the Trustee and of the Insurance Company. In the event that such Assignee is unable to obtain the benefit of any insurance accompanying the Contract Certificate assigned to him, from then and thereafter the deductions from the payments to be made by the Assignee-Investor under the terms of this Trust Agreement after the date of such assignment shall be the same as though said Contract Certificate was not originally accompanied by life insurance.

- 4. The Investor, by becoming a party to this Trust Agreement, appoints the Trustee his true and lawful attorney to perform and carry out the terms hereof and to purchase, hold, sell and/or transfer in the manner, for the purposes and at the times herein set forth that portion of the Trusteed Property to which the Investor is or may become entitled, hereby ratifying and confirming all that his said attorney shall lawfully do by virtue hereof.
- 5. The provisions hereof shall be construed according to, and all rights hereunder shall be governed by, the laws of the State of Pennsylvania.
- 6. Any notice to be given by the Trustee to the Company hereunder shall be duly given if mailed or delivered to the Company at such address as shall be specified by the Company to the Trustee in writing.
- 7. Any notice to be given to the Trustee hereunder shall be duly given if mailed to the Trustee at its principal office in the City of Philadelphia and State of Pennsylvania.
- 8. Any notice to be given to any Investor hereunder shall be duly given if mailed to such Investor at his address then appearing upon the registry books of the Company kept by the Trustee.
- 9. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which taken together shall be deemed one and the same instrument. An executed copy of this Trust Agreement shall be permanently on file at the principal office of the Trustee and shall be open to inspection by any Investor at any reasonable time or times.

IN WITNESS WHEREOF, Capital Savings Plan, Inc. has caused this Trust Agreement to be executed in its name by its President and its corporate seal to be hereunto affixed and attested by its Secretary; and The Pennsylvania Company for Insurances on Lives and Granting Annuities, as Trustee as aforesaid, has caused this Trust Agreement to

be executed in its name by one of its Vice Presidents and its corporate seal to be hereunto affixed and attested by its Secretary or an Assistant Secretary as of the day and year first above written.

CAPITAL SAVINGS PLAN, INC.

By Alfred H. Geary

(Corporate Seal)

President

Attest:

ROBERT A. BONNER
Secretary

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES

By FRANK G. SAYRE

(Corporate Seal)

Vice-President

Attest:

LEWIS M. EVANS
Asst. Secretary

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CARPATAL SAVINGS PLAIN CONTINE OF INSURANCE ACCOMPANIED BY INSURANCE CAPITAL SAVINGS PLAN, INC. (hereinafter called "Compa

WHEREAS, the Investor desires to become a party to a certain Agreement of Trust dated as of May I, Trustee and such persons as May from time to time become parties thereto (hereinafter called the "Trust investment in Investment in the Investor shall make monthly cash payments to the Trustee over a period of of banks, trust companies of banking institutions, or certificates of deposit or of interest or of participation evid (hereinafter called "Trusteed Property"); and
WHEREAS, said Trust Agreement provides that the Investor, by purchasing an agreement in the become entitled to all the rights and privileges, limitations and conditions therein set forth;

WHEREAS, resident the rights and privileges, limitations and conditions therein set forth;

WHEREREVEREN in consideration of the premises and of the mutual covenants herein contained, the winest."

agrees to pay to The Pennsylvania Company for Insurances

equal payments of \$ TEN ANNUAL
TWENTT SEMI-ANNUAL
FORTY QUARTERLY
ONE HUNDRED TWENTY MONTHLY

by the said Trustee is hereby acknowledged. The Investor further agrees to make each of the additional payments promptly whe due to The Pennsylvania Company for Insurances on Lives and Granting Annuuties, Trustee, at its principal office, Fifteent and Chestnut Streets, Fhiladelphia, Pennsylvania, or at such other place as the Trustee may in writing from time to time decedent The Trustee will apply all payments made from time to time hereunder to the purchase of Trusteed Property in the manner and at the time set forth in the Trust Agreement less amounts to be deducted therefrom as set forth in the Trustee to manner and at the time set forth in the Trust Agreement less amounts to be deducted therefrom as set forth in the Trustee to the case of the rise of Twenty-five Cents (25 for the expense of administering the Trust hereby created, including the compensation of the Trustee; (b) From each monthly instalment paid, a sum sufficient to discharge the insurance premiums as they become due; (c) From the first twelve payments made hereunder, a sum in the aggregate not in excess of the rate of Sixty Rollars (\$60.) for each Twelve Hundres 18 fullon) agreed to be paid in upon this Contract Certificate, which shall be paid by the Trustee to the Company shall from time the writing direct.

charge to be destructed root all or any sucra has every payments, in some projects and for from the dividends and/or time in writing direct.

The Trustee shall deduct from payments made to it from time to time hereunder and/or for the made upon the Trusteed Property or or laude as may be income thereform or upon as any exsessment made on the Trusteed Property or laude the property or laude the property or upon the Trusteed Property or upon the Trusteed Property or upon the income thereform or upon it as a Trustee hereunder, under any present of titure law of the United States of America or of any state, country, municates of or other governments. The painty of or other taxing authority, present of titure law of the Investor brings the Investor shall have the right from the date of such completion, in Trust, for the account of the Investor, brings such extended period the Trusteed Property to which he is entitled for a period of ten years collect all payments, dividends and/or distributions from time to time made to such organic and rights of the Company, the Trustee and the Investor shall have the right during such extended period. The Investor, provided, bowever, the Investors shall have the right during such extended period to the Trustee and the Investor, provided, bowever, the Investor and Investor shall such the cascrate of and option by the Investor; provided, bowever, the Investors and Investor shall such the cascrated to be paid to the Investor; property, and thereupon the Trustee shall forthwist property as any part of the cash distributions and rights of the Organic Investor; Investor to the Trustee shall continue and a payments of the cash distributions from time to the Investor of this organic payments of the organic and organic provided by the Investor of the States of the Investor of the Inv

CAPITAL SAVINGS PLAN, INC.
By authorised of signature of day of ATTEST:

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INSURANCE

The Company has arranged for life Ansurance upon the life of the Investor under a blanket life insurance policy during the term of this Contract Certificate or for a period of sixty days after any default in the payments herein Said policy provides that, subject to the terms, conditions and privileges set forth in said policy, upon Insurance Company issuing such policy will pay to the Trustee the amount equal to the difference between the total amount of receipt of due proof of death of the Investor occurring while said policy is in force and while insured thereunder, the The policy of insurance whereby the life of the Investor holding this Certificate is insured shall be held by the Trustee and shall be payable to the Trustee, and the premiums thereon shall be paid by the Trustee, all as agent for the Company, but only when and as payments are made to the same as agent for the Company to the Insurance Company or Companies. The benefits of the life insurance policy will not be available to the Trustee or the Company if (a) the Investor shall commit suicide while either same or insane within two years from the date hereof, or (b) the Investor shall die while more than sixty days in default under the terms hereof. Where the Investor is in default in any payment as herein provided, for more than sixty days, he shall not be entitled to shall deduct from the payments made by the Investor an amount for premiums for the account of the Company and pay the to be made by the Investor under the terms hereof and the amount which the Investor has paid here-The Trustee any benefits under the terms and provisions of such policy and the insurance shall be reinstated only upon his furnishing Trustee by the Investor or someone on his behalf, in accordance with the terms of this Contract Certificate. under, but in no event in excess of Nine Thousand Six Hundred Dollars (\$9,600.). life Ansurance upon the nce of insurability satisfactory to the Insurance Company.

On the death of the Investor and receipt by the Trustee of the proceeds of the policy of life insurance upon his life, the Trustee shall within twenty days apply such proceeds, with no further deductions, to the purchase of Trusteed Property, as provided in the Trust Agreement, and the Contract Certificate of the deceased Investor shall thereupon become full paid and all rights thereunder shall pass to the duly qualified personal representative or representatives of the Investor, or to the then Trustee under any outstanding and unrevoked Declaration of Trust.

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Nothing contained in this agreement shall be deemed to be a representation or promise on the part of the said Insurance Company under any accountability or responsibility whatsoever to the Investor, but its entire responsibility shall be exclusively to the Company and is to be determined wholly in accordance with the terms and conditions of such group and/or blanket life insurance policy as may at the time be outstanding in the name of the Company.

to a credit for but shall not be entitled to be reimbursed for, any deductions made previous thereto pursuant to the terms of the Trust Agreement) to the purchase of Trusteed Property, and shall continue to hold the same for the benefit of the Investor owning such Full Paid Contract Certificate. All distributions upon the Trusteed Property applicable to such Full Paid Contract Certificate shall be collected by the Trustee and applied to the purchase of additional Trusteed Property until maturity of such Full Paid Contract Certificate or earlier termination thereof. From and after the date at which a FULL PAID CENTIFICATES. In the case of a Full Paid Contract Certificate, the Trustee shall forthwith apply the payment made thereon (less a sum not in excess of two and one-half per cent. (2½%) of the amount paid in upon such Contract Certificate to be paid by the Trustee to the Company as its full service charge for the entire period during to time made upon such Trusteed Property, a sum not in excess of two-tenths of one per cent. (2/10 of 1%) per annum of the amount paid in upon such Contract Certificate as its charge, and compensation for the expense of administering the Trust during the time that said Full Paid Centract Certificate shall continue in force in lieu of but in addition to the deductions which the Contract Certificate shall continue in force; provided, however, in the event any instalment Contragt Certificate is converted into a Full Paid Contract Certificate pursuant to the terms of the Trust Agreement, the Investor shall be entitled Certificate may be terminated at any time and any Investor may at any time convert an instalment Contract Certificate into if any theretofore made for the account of the Trustee under the provisions of the Trust Agreement. Any Full Paid Contract Contract Certificate shall be full paid the Trustee shall deduct from all payments, dividends and/or distributions from time ontract Certificate by paying to the Trustee the aggregate of all remaining unpaid instalments due thereon. Pull Paid C.

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due and owing under the terms of his Contract Certificate may give written notice to the Trustee of his desire to accept delivery of the Trusteed Property, or any part thereof, which up to that time has been purchased for his benefit and in such event and upon payment to the Trustee of the sum of \$2.00 to be retained by it as its fee for complying with such Property for the benefit of the Investor. Thereafter the Investor shall continue his payments in accordance with his Contract Certificate and the Trustee shall invest the same, less deductions, in Trusteed Property under the terms of the Trust Agreement as though the Investor had not withdrawn any part of the Trusteed Property. Before any Investor shall be entitled to receive any Trusteed Property under this provision he shall be required to surrender his Contract Any Investor who shall not be in default with respect to any payments notice and of the amount required for necessary transfer stamps and other transfer charges required to be paid by the Trustee, the Trustee shall proceed to obtain transfer of said Trusteed Property into the name of the Investor, or into the name of his nominee and to make delivery of same, provided however, that the Trustee shall retain any fractional shares of Trusteed Certificate to the Trustee for the purpose of noting thereon delivery of the Trusteed Property to him. WITHDRAWALS AND PARTIAL WITHDRAWALS.

the consent in writing endorsed thereon by the Company after proper application has been made and \$1.00 has been paid to the Company to be retained by it as its service fee, and the Assignee has endorsed thereon his acceptance of the terms of the said Contract Certificate and the Company shall have duly notified the Trustee of its approval of said Assignment. From then and thereafter the Assignor-Investor shall be relieved and discharged of all obligations and duties under, and shall have no further rights or interests in, his Contract Certificate or in the Trust Agreement, and the Assignee-Investor shall be deemed and taken to have become substituted in the place and stead of the Assignor-Investor. Upon such assignment and may be assigned to any individual acceptable to the Company, but no assignment or transfer thereof shall be valid without consents, the insurance benefits, if any, in said Contract Certificate will terminate as to the Investor but the said insurance benefits will be extended to the Assignee subject to the approval of the Company and of the Trustee and upon proof of insura-In the event that such Assignee is unable to obtain the benefit of any insurance accompanying the Contract Certificate assigned to him, the deductions from the payments to be made by the Assignee-Investor under the terms of the Trust Agreement after the date of such assignment shall be the same as though said Contract Any Capital Savings Plan Contract Certificate, if in force and not cancelled on the books of the Trustee Certificate was not originally accompanied by life insurance. satisfactory to the Insurance Company.

AUTHORIZATION OF LIQUIDATION. Any Investor may, upon or after the issuance to him of a Contract Certificate, execute and file with the Company a writing in form satisfactory to the Company, authorising the Company to cause such Investor's Contract Certificate to be liquidated by the Trustee when the Trusteed Property to which the said Investor is tion of liquidation, the Company shall, when and as said net market value has been attained, notify the Trustee to sell the Trusteed Property to which the said Investor is entitled and to pay over to the said Investor the entire net proceeds of such by the Investor at any time before such liquidation has been effected by the giving to the Company by the Investor of Company shall forthwith give written notice thereof to the Investor. Any such authorization of liquidation may be revoked entitled has attained a net market value of Two Thousand Pollars (\$2,000) in relation to each Twelve Hundred Dollars written notice of the said Investor's desire to effect such revocation, and shall be revoked by any earlier termination of the (\$1,200) agreed to be paid in on said Certificate by said Investor. Upon the execution and filing with it of such authorizasale upon the surrender to the Trustee by the Investor of the Contract Certificate so liquidated, Contract Certificate under any of the provisions of this Trust Agreement. Any Capital Savings Plan Contract Certificate, if in force and not cancelled on the books of Trustee, may be liquidated at any time by giving notice to the Trustee. Such notice shall be accompanied by the will, in the event of such liquidation, remit to the Investor the proceeds of the sale of his Trusteed Property within ten days of the receipt of such notice. There is no liquidation fee. The Trustee LIQUIDATION. Certificate.

the form and provisions of which shall be satisfactory to the Trustee, providing, inter alia, that the Investor holds all his right, title and interest in the Trusteed Property mentioned in his Contract Certificate in trust for a certain named beneficiary but reserves the right to revoke the trust without such beneficiary's consent. Such uniform Declaration of Trust shall contain such other terms and conditions as shall be satisfactory to the Trustee, but the form thereof in use may be changed from DESIGNATION OF BENEFICIARY. The Company may a lopt for execution by Investors a uniform Declaration of Trust, time to time at the option of the Company provided the changes are satisfactory to the Trust

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By Authorised Officer		2			ate.	President.	ntrac	Pin Co	President.	Pres of th	terms	the	deco
ON LAYES AND CRANTING ANNUITIES, Trustee.	193			jo	- day of	1			d th	Assignment is approved this VINGS PLAN, INC.	LAN,	38 P	Assi
De stamped "FULL PAID" across the lace thereof The Pennstlvanta Company for Infordance			ny.	ошрв	the C	nment will not be valid until approved by the Company.	ouddi	until	Pila	2	I not	It wil	nme
AND GRANTING ARVOITIES, Trustee, has caused this Certificate to be executed by its authorises officer and the within Contract Certificate to	[sear]				4 ,					e of:			e of
mentioned Trust Agreement without further payment. To evidence such fact, The Penn stlvania Company for Insulances on Live	pus s	ndition 193	ms, 60	I ter	2	all rights acquired thereunder and subject to all terms, conditions and rein contained.	bas	under	there	uired	acquirined.	all rights acq rein contained y hand and or	rein y ba
Contract Certificate is converted into a full past Contract Certificate and the Investor is entitle to all rights and privileges under the within							4	7	1				
amount due under the terms hereof, receip	Or received assign the same to		-	***************************************			to	ficate, hereby assign the same to-	the	Lenign	eby a	, her	Scatt

The Entire Issue of which this Certificate is a part shall be offered for sale and shall be sold only to persons resident within the State of Pennsylvania.

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CAPITAL SAVINGS PLAN,

intercherent the Company and The Provistivan Courant por Instrument of Alwards and Courant parties therefore the Company and The Provistivanta Courant por Instruments of Lives are alled the "Trust Agreemed such persons as may from time to time become parties thereto (hereinafter called the "Trust Agreemed in vestment in Independence Trust Shares Certificates or, as provided, in said Trust Agreement, in other trust shares or requires the same of the said Trust Agreement, in other trust shares or require the same of the securities underlying securities reasonably comparable to the securities underlying Independence Trust Shares to require the securities underlying Independence Trust Shares to the securities underlying Independence Trust Shares to the securities underlying Independence Trust Shares the Instruction thereof on behalf of the Trustee, shall become a party to said Trust Agreement become, upon authentication thereof on behalf of the Trustee, shall become a party to said Trust Agreement become entitled to all the rights and privileges, limitations and conditions therein set forth;

WIOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, this agree estor desires to become a party to a certain Agreement of Trust dated as of a and Trie Prinstruanta Company for Instruments on Lives and Grass may from time to time become parties thereto (hereinafter called the the Investor shall make monthly cash psyments to the Trustee over a Trust Shares Certificates or, as provided, in said Trust Agreement, in other panking institutions, or certificates of deposit or of interest or of participal underlying securities reasonably comparable to the securities underlying Independent

Wilness

Dollars (\$ agrees to pay to The Pennsylvania Company seth. The Investor

equal payments of \$ TEN ANNOAL TWENTY SEMI-ANNOAL FORTY QUARTERLY ONB HUNDERD TWENTY MOWTHLY Trustee,

id Trustee is hereby acknowledged. The Investor further agrees to makeeach of the additional payments promotly where the first hereby acknowledged. The Investor further agrees to makeeach of the additional payments promotly where the Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee, at its principal office, Fifteen that Streets, Philadelphia, Pennsylvania, or at such other place as the Trustee may in writing from time to time directly and at the purchase of Trusteed Property in that dat state the time set forth in the Trust Agreement less amounts to be deducted therefrom as set forth in the Trust Agreement less amounts to be deducted therefrom as set forth in the Trustee to proving a follows: (a) From each monthly instalment paid, which shall be retained by the Trustee to proving the Dollars (\$10.), or fraction thereof, of said monthly instalment, which shall be retained by the Trustee to proving a made hereunder; a sum in the aggregate not in excess of the rate of Sixty Dollars (\$60.) for each Twelve Hunding and hereunder; a sum in the aggregate not in excess of the rate of Sixty Dollars (\$60.) for each Twelve Hunding \$1200.) agreed to be paid in upon this Contract Certificate, which shall be paid by the Trustee to the entire period during which this Contract Certificate shall continue in force, said service charge for the entire period during which this Contract Certificate shall continue in force, said service charge for the entire period during which this Contract Certificate shall continue in force, said service charge for the may such first twelve payments, in such proportion as the Company shall from time

shall deduct from payments made to it from time to time hereunder and/or from the dividends and time to time made upon the Trusteed Property any or all such amounts as may be necessary to discha de on the Trusteed Property held by it, or for any taxes or other governmental charges which have be osed upon this Contract Certificate or upon the Trusteed Property or upon the income therefrom or uponer, under any present or future law of the United States of America or of any state, county, mun

it as Trustee hereumory, unurer any processive to be made by the Investor to the Trustee, the Investor shall have the right to direct the Trustee in writing to hold the portion of Trusteed Property to which he is entitled for a progiod of ten years from the date of such completion, in Trust, for the account of the Investor. Justing such extended period the Trustees in writing to the account of the Investor. Justing such extended period the Trustees and the Investor shall have the right during such extended period, at his option, to direct the Trustee and the Investor; provided, however, the Investor shall have the right during such extended period, at his option, to direct the Trustee into the Trustee and Investor shall have the right during such extended period, at his option, to direct the Trustee of the Trustee and Investor shall have the right during such extended period, at his option, to the rivestor shall in writing to pay over to discontinue to make pryments of such cash distributions from time to time made to the Trustee upon the Trustee to a further prover of the law of the Investor of his option to continue the Trustee property as unm not in cross of two-tenths and frust Agreement, the Trustee, during each year of such extended period, shall deduct from all payments, dividends and/or distributions from time to time made to said Trustee upon the Trusteed Property as sum not in cross of two-tenths of one per cent. (2/10 of 1%) per annum of the total amount paid in on this Contract Certificate, as its charge and compensation for the expense of administering the Trust during such extended period.

This contract Certificate in the manner set forth in the Trust Agreement the Investor may, upon surrender of this Contract Certificate, demand and receive his share of Trusteed Property purchased for his account, or may direct the sale three demands of certificate in the manner set forth in the Trust Agreement of the terms of the Trus

and upon the conditions se

shall have been authenticated by ranting Annuities, Trustee. the shall not be valid or become obligatory until it shall have analytania Company for Insurances on Lives and Granting An EOF, the Company has caused this Contract Certificate to be discorporate seal duly affixed, attested by its Secretary or Ass forth in the T authorize

CAPITAL SAVINGS PLAN, INC. signature of day of

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until maturity of such Full Paid Contract Certificate or earlier termination thereof. From and after the date at which a Contract Certificate shall be full paid the Trustee shall deduct from all payments, dividends and/or distributions from time to time made upon such Trusteed Property, a sum not in excess of two-tenths of one per cent. (2/10 of 1%) per annum of payment made thereon (less a sum not in excess of two and one-half per cent. (21/2%) of the amount paid in upon such Contract Certificate to be paid by the Trustee to the Company as its full service charge for the entire period during is converted into a Fuil Paid Contract Certificate pursuant to the terms of the Trust Agreement, the Investor shall be entitled of the Trust Agreement) to the purchase of Trusteed Property, and shall continue to hold the same for the benefit of the Investor owning such Full Paid Contract Certificate. All distributions upon the Trusteed Property applicable to such In the case of a Full Paid Contract Certificate, the Trustee shall forthwith apply the which the Contract Certificate shall continue in force; provided, however, in the event any instalment Contract Certificate Full Paid Contract Certificate shall be collected by the Trustee and applied to the purchase of additional Trusteed Property Certificate may be terminated at any time and any Investor may at any time convert an instalment Contract Certificate into the amount paid in upon such Contract Certificate as its charge and compensation for the expense of administering the Trust during the time that said Full Paid Contract. Certificate shall continue in force in lieu of but in addition to the deductions if any theretofore made for the account of the Trustee under the provisions of the Trust Agreement. Any Full Paid Contract a Full Paid Contract Certificate by paying to the Trustee the aggregate of all remaining unpaid instalments due thereon. credit for but shall not be entitled to be reimbursed for, any deductions made previous thereto pursuant to the FULL PAID CERTIFICATES.

due and owing under the terms of his Contract Certificate may give written notice to the Trustee of his desire to accept delivery of the Trusteed Property, or any part thereof, which up to that time has been purchased for his benefit and in Contract Certificate and the Trustee shall invest the same, less deductions, in Trusteed Property under the terms of the the 'rrustee shall proceed to obtain transfer of said Trusteed Property into the name of the Investor, or into the name of his nominee and to make delivery of same, provided however, that the Trustee shall retain any fractional shares of Trusteed Thereafter the Investor shall continue his payments in accordance with his Trust Agreement as though the Investor had not withdrawn any part of the Trusteed Property. Before any Investor shall be entitled to receive any Trusteed Property under this provision he shall be required to surrender his Contract Any Investor who shall not be in default with respect to any payments such erent and upon payment to the Trustee of the sum of \$2.00 to be retained by it as its fee for complying with such notice and of the amount required for necessary transfer stamps and other transfer charges required to be paid by the Trustee, Certificate to the Trustee for the purpose of noting thereon delivery of the Trusteed Property to him. WITHDRAWALS AND PARTIAL WITHDRAWALS. of the Investor. Property for the benefit

the consent in writing endorsed thereon by the Company after proper application has been made and \$1.00 has been paid to the Company to be retained by it as its service fee, and the Assignee has endorsed thereon his acceptance of the terms of the may be assigned to any individual acceptable to the Company, but no assignment or transfer thereof shall be valid without thereon by the Company after proper application has been made and \$1.00 has been paid to Any Capital Savings Plan Contract Certificate, if in force and not cancelled on the books of the Trustee, ABBIGNACENTS.

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deemed and taken to have become substituted in the place and stead of the Assignor-Investor. OUpon such assignment and fifts will be extended to the Assignee subject to the approval of the Company and of the Trustee and upon proof of insurfability satisfactory to the Insurance Company. In the event that such Assignee is unable to obtain the benefit of any insurance accompanying the Contract Certificate assigned to him, the deductions from the payments to be made by the Assignee. Investor under the terms of the Trust Agreement after the date of such assignment shall be the same as though said Contract estor shall be relieved and discharged of all obligations and duties under, and shall have no further rights or interests in, his Contract Certificate or in the Trust Agreement, and the Assignee-Investor shall be consents, the insurance benefits, if any, in said Contract Certificate will terminate as to the Investor but the said insurance Trustee of its approval of said As perpany shall have duly notified the Certificate was not originally accompanied by life insurance. aid Contract Certificate and the C then and thereafter the As

(\$1,200) sgreed to be paid in on said Certificate by said Investor. Upon the execution and filing with it of such authorisation of liquidation, the Company shall, when and as said net market value has been attained, notify the Trustee to sell the Trusteed Property to which the said Investor is entitled and to pay over to the said Investor the entire net proceeds of such sale upon the surrender to the Trustee by the Investor of the Contract Certificate so liquidated. Upon such liquidation the Any such authorisation of liquidation may be revoked by the Investor at any time before such liquidation has been effected by the giving to the Company by the Investor of stor's Contract Certificate to be liquidated by the Trustee when the Trusteed Property to which the said Investor is written notice of the said Investor's desire to effect such revocation, and shall be revoked by any earlier termination of the entitled has attained a net market value of Two Thousand Dollars (\$2,000) in relation to each Twelve Hundred Dollars xecute and file with the Company a writing in form satisfactory to the Company, authorizing the Company to cause suc to him of a Contract Certific or after the issuance Contract Certificate under any of the provisions of this Trust Agreement. Company shall forthwith give written notice thereof to the Investor. AUTHORIZATION OF LIQUIDATION. Any Investor

and not cancelled on the books of Trustee. Such notice shall be event of such liquidation, rer the proceeds of the sale of his Trusteed Property within ten days of the receipt of such notice. if in force the Trustee, may be liquidated at any time by giving notice to the Trustee. Certificate. There is no liquidation fee. The Trustee will, in the event of Any Capital Savings Plan Contract Certificate,

that the Investor holds all his tors a uniform Declaration of Trust, reof in use may be changed fror Such uniform De story to the Trustee. and provisions of which shall be satisfactory to the Trustee, providing, inter alia, e and interest in the Trusteed Property mentioned in his Contract Certificate in trust tain such other terms and conditions as shall be satisfactory to the Trustee, but the form the time to time at the option of the Company provided the changes are satisfactory to the Truste The Company may adopt for execution by Inves but reserves the right to revoke the trust without such beneficiary's conse DESIGNATION OF BENEFICIARY. right, title and interest in the True

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In consideration of the payment of the full	amount due under theaterms hereof. receint	whereof is hereby acknowledged, the within	Contract Certificate is converted into a full paid	Contract Certificate and the Investor is entitled	to all rights and privileges under the within	mentioned Trust Agreement without further	payment. To evidence such fact, THE PENN-	STLVANTA COMPANY FOR INSTRANCES ON LIVES	AND GRANTING ANNUFIER, Trustee, has caused	this Certificate to be executed by its authorized	officer and the within Contract Certificate to	be stamped "rull PAID" across the face thereof,	TER PRINSTLYANIA COMPANY FOR INSTRANCES	ON LIVES AND GRANTING ARNUTTES.	
10	amount	whereof	Contrac	Contrac	to all r	mention	paymen	BTLVANI	AND GR	this Cer	officer a	be stam	TRE PER	NO	

FOR VALUE RECEIVED,

subject

Company the This Assignment will not be valid until approved

AND GRANTING FOR INSURANCES Chestnut Streets, Philadelphia, Pennsylvania,

the within mentioned Trust Agreement and that the above

Books of Capital Savings. Plan,

hereby certifies that this is a Contract

Certificate

of Capital Savings Plan, Inc., described in

AND GRANTING

by the Trustee at its office, Fifteenth and

named Investor is registered on the

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES

The Entire Issue of which this Certificate is a part shall be offered for sale and shall be sold only to persons resident within the State of Pennsylvania.

THIS AGREEMENT

and

DECLARATION OF TRUST

(hereinafter referred to as "this Agreement") dated as of the second day of April, 1930, made by and between Independence Shakes Corporation a corporation duly organized and existing under the laws of the State of Delaware (hereinafter referred to as "the Depositor") and The Pennsylvania Company for Insurances on Lives and Granting Annuities a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania (hereinafter referred to as) "the Trustee") witnesseth.

WHEREAS, the Depositor desires to deposit with the Trustee from time to time Deposit Units, consisting of shares of common stocks of certain companies or corporations (hereinafter generally termed "the Companies") and cash as herein provided for, and to provide for the issuance of one thousand (1000) Trust Shares, to be known as Independence Trust Shares, and to be represented by Trust Shares Certificates, against every such Unit, when and as deposited, and desires to set forth the terms and conditions under which such Deposit Units may be deposited with and held, administered, and applied by the Trustee for the benefit of the Depositor and other and subsequent holders of the Trust Shares Certificates, and desires to set forth and define the rights, powers, privileges, immunities and liabilities of the Depositor, the Trustee and the holders of Trust Shares Certificates;

Now, THEREFORE, for and in consideration of the premises and of the mutual covenants of the parties, it is hereby agreed as follows:

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ARTICLE ONE.

THE DEPOSIT UNIT.

- SECTION I. Simultaneously with the execution of this Agreement, the Depositor has deposited with the Trustee a Deposit Unit, which is composed of the following property and cash:
 - A. One Stock Unit, which shall consist of one (1) share of the common capital stock of each of the said corporations, as set forth in Exhibit "A", which is hereto annexed and hereby made a part hereof, as the said stocks were constituted on March 1, 1930.
 - B. One Distribution Unit, which shall-consist of
 - 1. A sum, in cash, equal to the total of the cash dividends paid on the said stocks comprising the said Stock Unit from and after March 1, 1930 to stockholders of record on that date or thereafter to and including the day preceding the date of the execution and delivery hereof.
 - 2. A sum, in cash, equal to the total market value of all stock dividends, subscription rights, securities and other rights and property (excepting cash) distributed by said Companies from and including March 1, 1930 to stockholders of record on that date or thereafter, to and including the business day last preceding the execution and delivery hereof. The market value of said stock dividends, subscription rights, securities and other rights and property shall be determined as of the close of business of the day preceding the date of execution and delivery hereof, provided that the market value of such subscription rights and other rights, as may have expired prior to the date of execution and delivery hereof shall be determined as of the close of business of the day preceding the date of expiration of such rights.

Section II. Additional Deposit Units may be deposited with the Trustee by the Depositor from time to time until February 28, 1950 or until prior termination of this Agreement, but each such additional Deposit Unit at the time of deposit must be identical in composition with each of the Deposit Units as they are composed at the close of business of the business day next preceding the date of deposit of each such additional Deposit Unit, and all Deposit Units must be identical, each with the other, at all times.

SECTION III. Subject to the provisions of Section II of this Article as to the time in which additional Deposit Units may be deposited with the Trustee, the number of Units which may be deposited and against which Trust Shares Certificates may be issued shall be unlimited.

Section IV. For the purposes of this article the term "market value" shall be defined as follows: The last sale price at the close of the day on which the market value is to be determined as shown by any published quotations in common use among bankers and brokers, and if there be no record of any sale on that day, then the last sale price on the last previous business day on which a sale is so published, and, if there be no such published quotation, then, the market value as shown by a letter from any recognized and reputable dealer in such class of security or property, less, in either case, customary odd-lot brokerage and commissions and all sales and transfer taxes payable by the seller in the case of the sale of such stock, security or property.

ARTICLE TWO.

THE TRUST SHARES.

SECTION I. After the execution and delivery hereof, and upon delivery to the Trustee from time to time of one or more and subsequent Deposit Units, the Trustee shall hold, administer and apply all Deposit Units for the use

and benefit of the Depositor, and other and subsequent holders of Trust Shares Certificates hereinafter provided for, in the manner, under the terms and provisions and for the time hereinafter set forth.

Secrion II. Upon the delivery to the Trustee of each Deposit Unit, the Trustee shall issue and deliver to the Depositor or upon its order, a certificate or certificates representing One Thousand (1000) Trust Shares, each Trust Share representing a one-thousandth (1/1000) interest in the said Unit. Such certificates shall be known and are hereinafter referred to as "Trust Shares Certificates," and shall be substantially in the form set forth in Exhibit. "B", which is hereto attached and hereby made a part hereof.

Section III. Each Trust Share issued hereunder, irrespective of the date of issue, shall rank equally with every other Trust Share.

SECTION IV. No Trust Shares Certificate shall be valid for any purpose unless and until authenticated by the Trustee in accordance with the certificate of authentication endorsed thereon, as set forth in Exhibit "B".

Section V. The Depositor may, at any time during the term of this Agreement, sell and assign to any person, firm, association or corporation whatever the said Trust Shares Certificates, and the Trustee, at the request of any holder thereof, shall register in appropriate books of record the Trust Shares represented by Trust Shares Certificates so offered for registration, in the name of the said holder or his nominee, and issue to the said holder, or his nominee, a registered certificate, in the form above specified. Thereafter such Trust Shares Certificates, whenever offered for transfer properly endorsed, shall be transferable on the books of the Trustee and a new certificate or certificates shall be registered in the name of the transferee or his nominee or nominees.

ARTICLE THREE.

ADMINISTRATION OF THE UNITS COMPRISING THE TRUST.

SECTION I. Certificates of the stock of the Companies and other securities deposited with the Trustee by the Depositor shall be duly endorsed in blank or accompanied by proper instruments for transfer to the Trustee, its nominee or nominees, or shall be registered in the name of the Trustee, its nominee or nominees, and if not so registered shall be forthwith transferred by the Trustee into its own name or the name of its nominee or nominees; and, subject to the provisions hereof, shall remain so registered until the same shall be transferred to the holders of Trust Shares or sold or delivered or withdrawn as provided in this Agreement. The Trustee may from time to time change its nominee or nominees. The Trustee may accept interim receipts or due bills of responsible banks trust companies or dealers in , securities pending delivery of certificates of stock of the Companies.

SECTION II. The Trustee shall hold the deposited stocks and property and shall receive all income, profits, earnings, dividends, rights, interest and other distributions of property from, and the proceeds of all shares of stock and of other property received or held by it hereunder, and shall apply, distribute and deal with the same under the terms and provisions hereof.

Section III. The Trustee shall hold all moneys deposited with it or received by it hereunder, as a general deposit until required to disburse the same in accordance with the provisions of this Agreement, and the requirements of any rule of law or statute now or hereafter in force regarding the investment or segregation of trust funds shall not apply to such moneys.

SECTION IV. The Trustee, in the manner hereinafter provided for, shall sell all shares of stock, subscription rights, securities and other rights and property received by

way of dividends or distributions in respect to the stocks comprising the Stock Units.

Section V. A. Should any one or more of the Companies fail to pay a usual dividend upon its stock, the Trustee shall give notice in writing to that effect to the Depositor, and the Depositor, in its discretion may thereafter direct the Trustee in writing to sell all of the shares of the stock of such Company held as part of any Stock. Unit in the manner hereinafter provided, and upon receipt of any such notice in writing, the Trustee shall sell such stock in the manner hereinafter provided, and thereafter the stock of such Company shall no longer be deemed or considered to be a part of any Stock Unit hereunder.

B. If, at any time, any of the Companies shall liquidate voluntarily or otherwise, or if, at any time, the Depositor should receive information that in its opinion would warrant the conclusion that the stock of any such Company may or will become substantially impaired in value, then the Depositor shall have the right, but not the obligation, in accordance with its sole discretion, to instruct the Trustee to sell such stock, and upon receipt of any such notice in writing the Trustee shall sell such stock, in the manner hereinafter provided, and thereafter the stock of such Company shall no longer be deemed or considered to be a part of any Stock Unit hereunder.

Section VI. In the event that the stock of any of the Companies included in the Deposit Units shall be split-up or changed to a greater number of shares of stock, the Trustee shall forthwith proceed to exchange the certificates then held by it and pending the exchange, or thereafter shall sell in the manner hereinafter provided, all the shares of stock or fractions thereof which it is entitled to receive, provided always, however, that the Trustee, following such a split-up or change shall retain one share of such new or exchanged common stock for each Stock Unit then held by it, and the share of stock so retained shall be held in the

same manner, in accordance with this Agreement as if such share of stock had been originally specified and named in the Stock Unit.

SECTION VII. In case any one or more of the Companies merges or consolidates with any other corporation or corporations or sells or conveys all or substantially all of its property as an entirety to another corporation or enters into or becomes a party to any plan or scheme or re-organization whereby its rapitalization is increased or reduced or altered or modified, or whereby a new corporation is formed which acquires all or substantially all of the property and assets formerly owned by any such Company, or in case of the happening of any event whereby the stock of any of the Companies deposited hereunder shall or may be exchanged for or converted into new stocks or securities of any such Companies, or of any other corporation, then and in every such case the Trustee shall exchange or convert the stock deposited hereunder for or into the stock and/or securities for which the same is exchangeable or into which it is convertible. In any of such events, the Trustee shall retain one share of such new common capital stock for and as part of each Stock Unit then held by it, and shall sell all other shares of stock, securities, subscription rights, and other rights or property received by the Trustee arising out of such merger, consolidation, reorganization or purchase in the manner hereinafter provided. In the event that the Trustee receives, as to each Deposit Unit then held by it, less than one share of common capital stock as a result of such exchange or conversion of any stock of the Companies, then the Trustee shall, upon the written instructions of the Depositor, and in the absolute discretion of the Depositor, either (1) retain the said fraction of such share of stock so received by it and hold and administer the same under the terms hereof as part of such Stock Unit or (2) shall purchase with funds then in the Distribution Account, which is hereinafter provided for, a fraction of a share of such stock, which together with the fraction of a share so

received, shall constitute one full share of such stock, and hold and administer the said full share of such stock under the terms hereof as a part of such Stock Unit, or (3) shall sell, in the manner in this Article provided, the fraction of such share of stock so received by it, and pay the net cash proceeds of the sale thereof into the Distribution Account, and thereafter the stock of such Company shall no longer be deemed or considered to be a part of such Stock Unit.

Section VIII. In case any event shall occur not specified in the provisions of this Agreement, requiring the exercise of discretion in the administration of the Deposit Units, the Trustee shall take such action with respect thereto as the Depositor, in its absolute discretion, shall direct in writing, or, if the Depositor shall fail to give such direction within five (5) days after the Trustee shall have given written notice of such event to the Depositor, then as the Trustee in its absolute discretion shall determine.

Section IX. Whenever the Trustee under any provision of this Agreement is required to sell any stock, securities, subscription rights, or other rights or property, such property shall be sold not later than thirty days after the receipt thereof by the Trustee. All such property required to be sold under the terms of this Agreement shall and may be sold in such manner and at such place, by private or public sale or at auction as the Depositor in its absolute discretion, by notice in writing to the Trustee, may direct. The time of any such sale and the price at which any such property shall be offered for sale by the Trustee, whether on a stock exchange or otherwise, shall be determined by the Depositor in its absolute discretion, with the purpose of obtaining the highest price, in the opinion of the Depositor reasonably obtainable therefor, considering the period within which such sale must take place, the amount of such property to be offered for sale and the condition of the market or markets. If, within five (5) days prior to the expiration of the period in which such sale is required to

be made, the Trustee, for any reason, shall have been unable to make any sale in accordance with the direction and instructions of the Depositor, or if the Depositor shall have failed to give any direction in respect thereof, the Trustee shall make sale at any time, place and price determined by the Trustee in its absolute discretion.

Section X. The Trustee shall maintain an account, to be referred to as a Distribution Account, in which all cash dividends and the proceeds of all sales of shares of stock, securities, rights or other property, less all taxes, commissions and other charges incident to such sales shall be deposited. For purposes of this Agreement, all cash dividends paid by any of the Companies (excepting dividends distributed in liquidation or dissolution of any of the said Companies) shall be considered as income, and the proceeds of the sales of any property required to be sold hereunder and any dividends received by the Trustee as a distribution in liquidation or dissolution of any of the said Companies shall be considered as principal.

Section XI. On the occasion of each distribution, provided for hereunder, the Trustee shall prepare an appropriate statement as to such distribution in order to assist the registered holders of Trust Shares Certificates in computing the amount of any income tax payable by them on account of their interest in the property held or distributed by the Trustee under this Agreement, and upon application by said holders of Trust Shares Certificates, at any reasonable time, the Trustee shall furnish a copy of such statement. The Trustee shall not in any event be responsible for the accuracy of such statement nor be liable in any event for any loss or damage caused by anything contained in or omitted from an estatement so prepared or furnished.

SECTION XII. Whenever the Trustee shall issue Distribution checks, it shall withdraw from the Distribution Account and deposit in a separate and appropriately designated general deposit account a sum equal to the amount neces-

sary to pay the checks so issued, and all distribution checks shall be paid out of such account. In no event shall any moneys against which there are checks outstanding and unpaid be deemed or considered as part of the currently distributable funds. In case any distribution check shall not have been presented for payment within six years after the date of issue thereof, the Trustee, upon the written order of the Depositor shall pay over to the Depositor the moneys payable with respect to such check, and thereafter the holder shall look only to the Depositor for payment thereof. Neither the Trustee nor the Depositor shall be required to pay to such payee interest on any moneys so held by the Trustee or paid over by it to the Depositor.

Secrion XIII. The Depositor is hereby authorized and empowered from time to time with the written approval of the Trustee to enter into any agreement or agreements with any of the Companies, intended to facilitate the collection of income or the enforcement of any other rights, powers or duties of the Trustee, in respect of the deposited stock

Section XIV. The Trustee, so long as any stock is o held by it hereunder, shall, upon the written demand of the Depositor, execute or cause to be executed and delivered to the Depositor, its nominee or nominees, but at the Depositor's sole cost and expense, proxies or powers of attorney to vote, or consent or otherwise act in respect of all such stock. In exercising the right to vote such stock the Depositor shall act solely for the benefit of the registered holders of the Trust Shares Certificates, and shall be guided by what it believes to be for the best interests of the said holders and the Depositor will exercise its best judgment from time to time in respect of such votes, consents or acts, but neither the Depositor nor the Trustee assumes any responsibility in respect of the management of the Companies nor in respect of any vote, consent or action taken by the Depositor, its nominee or nominees, nor shall the Trustee nor the Depositor be liable by reason of any error

of law or any matter or thing done or omitted or approved, voted or given or withheld by the Depositor under this Agreement, except each for its own wilful malfeasance or gross negligence. The Trustee shall not be liable to anyone with respect to any action taken or caused to be taken or omitted pursuant to any such proxy or power of attorney.

Section XV. oWhenever, pursuant to the provisions of Section III of Article Six hereof, the Trustee shall receive or shall, have accumulated one thousand (1000) Trust Shares, surrendered for cash redemption, the Trustee may, subject to the rights of the Depositor hereunder, cancel the certificates so surrendered, withdraw one Deposit Unit from the deposited property then held by it, liquidate the same as expeditiously as possible, and retain the proceeds of such liquidation.

ARTICLE FOUR.

REGISTRATION OF CERTIFICATES.

Section I. All certificates issued hereunder shall be registered and the Trustee shall provide a register for the registration of the Trust Shares Certificates and the addresses of the holders thereof, which register shall be kept at the principal office of the Trustee in the City of Philadelphia, Pennsylvania. The person in whose name the same shall be registered shall for all purposes be deemed and regarded as the owner thereof and payments on account of the principal and/or income of such shares shall be made only to or upon the order of such registered holder. such payments so made shall fully and clearly discharge the liability of the Trustee and the Depositor upon any such certificate so registered to the extent of the sum or sums so paid. Transfers of such certificates shall be made only on presentation and surrender of such certificates at the office of the Trustee and in accordance with such reasonable rates or charges, and under such reasonable regulations, as the Trustee may prescribe.

ARTICLE FIVE.

DISTRIBUTIONS AND TERMINATION OF TRUST.

SECTION I. On April first and October first in each year, the Trustee will pay to the registered holders of Trust Shares Certificates (of record on the books of the Trustee on the preceding March first or September first, as the case may be), if and to the extent received by the Trustee, distributions as follows, and subject to the following terms and conditions:

Each such semi-annual distribution shall consist of the appropriate proportional part of all distributable funds, as hereinafter defined, in the hands of the Trustee at the close of the business day on the next preceding twenty-eighth (28th) day of February or the thirty-first (31st) day of August, as the case may be.

SECTION II. The term "Distributable Funds", wherever used in this Agreement, shall mean any cash distributions made by any of the Companies out of surplus earnings or profits or in liquidation or dissolution received by the Trustee during the six months period in respect of which the current semi-annual distribution is made, and also, as to such period, the net cash proceeds of the sales of any stock, securities, rights or other property, required to be sold hereunder, received by the Trustee; but the term Distributable Funds shall not include funds against which distribution checks issued at a prior distribution date are outstanding and unpaid, nor funds set up by the Trustee for payment of taxes or other proper charges under the terms hereof, nor funds required for the reimbursement of the Trustee as provided in Article Seven, Section VI, hereunder, nor interest on any deposits, nor funds applied by the Trustee for the purchase of fractions of shares if any be purchased, as authorized by Article Three, Section VII. For the purpose of determining what funds are distrib-

^{*}See Supplemental Agreement pp. S1, S2.

utable hereunder, cash distributions of any of the Companies shall be considered as received by the Trustee on the date of the receipt of the same by it, and the proceeds of the sale or sales of any property sold hereunder shall be considered as received by the Trustee on the date that such proceeds are paid to the Trustee, and not on the date when the property on which such proceeds were realized, was received by the Trustee.

SECTION III. Whenever, in the case of any semi-annual distribution, it shall appear that any fraction of one cent per share is distributable, the Trustee shall not then distribute such fractions of a cent, but the same shall remain on deposit in the Distribution Account and be applied to the next following semi-annual distribution.

SECTION IV. The Trust under this Agreement shall automatically terminate, as hereinafter provided, on October 1, 1950, unless sooner terminated as herein provided. The Trustee shall discontinue the acceptance of deposits of additional stock of the companies after February 28, 1950, and shall proceed, on March 1, 1950, and thereafter up to and including September 30, 1950, with the liquidation and sale of all securities then on deposit with it under the terms and conditions hereof. The transfer books for the registration and transfer of Trust Shares Certificates shall be finally closed at the close of business on August 31, 1950, and thereafter the Trustee shall not be required to transfer any such certificates. On October 1, 1950, the Trustee shall distribute pro rata all cash proceeds of such sales of securities, together with all cash funds held by it in the Distribution Account, after deduction of any reasonable brokerage fees or commissions which may be paid by the Trustee, and expenses of the Trustee, in connection with such sales, and after setting up and reserving amounts sufficient in the judgment of the Trustee to cover all taxes, expenses and other charges incident to the termination of the Trust, to the registered helders of outstanding Trust Shares Certificates, upon surrender of certificates to the Trustee and upon payment to it of the amount required to pay any Government and stamp duties and any other taxes of any kind and of any and all transfer fees or charges of any kind, if required; and after the final distribution by the Trustee no further rights shall accrue or belong to holders of Trust Shares Certificates who fail to present their certificates to the Trustee, except the right to receive a pro rata share of the distribution without interest, subject to the provisions of Section V of this Article.

SECTION V. In case any certificate or certificates shall not be presented pursuant to Section IV of this Article within six years after October 1, 1950, the Trustee, upon the written order of the Depositor, shall pay over to the Depositor the moneys, if any, payable with respect to such certificate or certificates; provided, however, that the Trustee, before being required to make such payment, may cause notice to be published, at the expense of the Depositor, once a week for four successive calendar weeks (in each case on any day of the week) in a daily newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in such a newspaper published in the City of Philadelphia, Pennsylvania, stating that such moneys have not been claimed and that after a date specified therein such moneys will be paid over to the Depositor; and thereafter the holder or holders of such certificate or certificates shall look only to the Depositor for payment thereof. Neither the Trustee nor the Depositor shall be required to pay the holder of any certificate interest on any moneys so held by the Trustee or paid over by it to the Depositor.

ARTICLE SIX.

RIGHTS OF THE HOLDERS OF TRUST SHARES CERTIFICATES.

Section I. The holders of Trust Shares Certificates shall be entitled to receive semi-annual distributions on April first and October first each year until and including

April first, 1950, and a final distribution on October first, 1950, to the extent and in the manner provided in Article Five hereof:

SECTION II. At any time prior to March 1, 1950, or the earlier termination of this Trust, if it be sooner terminated, any registered holder of Trust Shares Certificates representing One Thousand (1000) Trust Shares, upon surrender thereof for conversion, and upon payment in eash to the Trustee of the amount required to pay any Government or stamp duties or other taxes of any kind, all transfer charges and fees of any kind if required, shall be entitled to receive, duly endorsed, and in proper form for transfer, all the shares of the stocks deposited with the Trustee then constituting one Stock Unit, and a cash sum equivalent to the cash value of one Distribution Unit, as of the close of business on the date of surrender of said certificates upon giving to the Trustee ten days notice in writing, accompanied by deposit of said Trust Shares Certificates, of the intention of the holder to surrender said certificates and upon such surrender such certificates shall forthwith be cancelled by the Trustee.

Section III. At any time prior to the final distribution or the earlier termination of this Trust if it be seoner terminated, the registered holder of any Trust Shares Certificates, upon surrender thereof for redemption (and a payment in cash to the Trustee of the amount required to pay any government or state stamp duties or other taxes of any kind) shall be entitled to receive cash in an amount equivalent to the redemption value per share so offered for redemption as of the close of business on the date of such surrender, upon giving the Trustee three (3) days notice in writing, accompanied by deposit of said Trust Shares Certificates, of the intention of the holders to surrender such certificates. The Trustee shall, immediately upon the surrender of such certificates for redemption, notify the Depositor of such event and the Depositor shall have an option

to purchase such shares at any time within the first two days of such three day period by paying to such holder the cash redemption value which would otherwise have been paid by the Trustee.

Section IV. The cash redemption value for each Trust Share, presented to the Trustee as provided in Section III of this Article shall be 1/1000 of the net market value of the shares of stock then comprising the Stock Unit, plus 1/1000 of the cash value of one Distribution Unit, as, of the close of business on the date of surrender of such certificates,

Section V. The term "net market value" wherever it is used in this Article shall be determined by the Trustee by taking the bid price of the stocks, securities, rights or other property, at the close of business of the day of surrender of the Trust Shares Certificates to the Trustee, as shown by any published quotations in common use among bankers and brokers, or, if there be no such published quotations, then as shown in a letter from any recognized and reputable dealer in the stocks of any of the Companies, less, in either case, customary odd-lot brokerage and commissions and all sales and transfer taxes payable by seller in case of the sale of such stock, security or property.

Section VI. For the purposes of this Article the cash value of the Distribution Unit shall be defined as cash applicable to one Distribution Unit plus the net market value of stocks, securities, rights and other property applicable to one Distribution Unit required to be sold hereunder, received by the Trustee but not yet reduced to cash, less the proportionate part, applicable to one Deposit Unit, of any reserve which the Trustee may have been obliged to set up for the payment of any taxes under any law of the United States of America or of any taxing authority therein having jurisdiction, any sum set aside by the Trustee for the payment of assessments made on shares of stock or other property held by it hereunder, and any reserve set up by the

Trustee for the payment of expenses or counsel fees with respect to any action or suit relating to such taxes or charges, if there be any such reserves.

Section VII. The Trust Shares herein referred to shall carry no right to vote or consent or otherwise act in respect of the stocks or other property held by the Trustee under this Agreement. The rights of the holder of each of the Trust Shares Certificates shall be solely as set forth in this Agreement, and the acceptance of a Trust Shares Certificate shall constitute assent to each and every provision of this Agreement by the holder of such Certificate with the same force and effect as if such holder had in person executed and delivered this Agreement and was individually named as a party hereto.

ARTICLE SEVEN.

THE DEPOSITOR AND THE TRUSTEE.

SECTION I. The Trustee accepts the Trusts created by and pursuant to this Agreement and declares that it will faithfully perform them upon the terms and conditions, and in accordance with the provisions hereof.

Section II. Any company or corporation into which the Trustee or any successor to it may be merged or with which it or any successor to it may be consolidated, or any company or corporation resulting from any consolidation to which the Trustee, or any successor to it shall be a party, provided such company or corporation shall be a bank or trust company with trust powers incorporated under the laws of the United States of America or the Commonwealth of Pennsylvania shall be the successor Trustee under this Agreement without the execution or filing of any paper or any further act on the part of any of the parties hereto.

Section III. The Depositor shall be entitled to charge not in excess of one and one-half $(1\frac{1}{2})$ cents semi-annually for each Trust Share outstanding on February 28th and

August 31st of each year as an administration fee hereunder, out of which sum the Depositor shall pay the Trustee its fees for its services hereunder; but the Depositor shall have the right to charge less than such amount if it so elects. Said administration fee as fixed by the Depositor from time to time, under the terms of this section, shall be deducted from the funds in the Distribution Account and shall be paid by the Trustee to the Depositor on April first and October first of each year.

SECTION IV. The Trustee shall not be entitled to receive any compensation for its services out of the deposited property, but may receive such compensation for its services from the Depositor as agreed upon with the Depositor.

SECTION V. The Trustee shall not be entitled to receive any reimbursement for expenses incurred by it hereunder out of the deposited property except as in this agreement expressly provided.

Section VI. In no event shall the Trustee be personally liable for any assessments made on shares of stock or other property held by it, the title to which it shall have taken either in its own name or in the name of its nominee or nominees, or for taxes or other governmental charges imposed upon the property held by it hereunder or upon the income therefrom or upon it as Trustee hereunder which it may be required to pay under any present or future law of the United States or any taxing authority therein having jurisdiction. For all such assessments and taxes, if any are imposed upon the Trustee, or for any expenses and counsel fees it may sustain or incur with respect to such assessments, taxes or charges, the Trustee shall be reinfbursed and indemnified first out of the Distribution Account, and next out of the net cash proceeds of sales of the property by it hereunder before final distribution.

SECTION VII. The Trustee shall keep proper books of record, an account of all transactions hereunder, and a

duplicate original of this Agreement at its principal office in the City of Philadelphia, Pennsylvania, and the same shall be open to the inspection of the Depositor or any registered holder of a Trust Shares Certificate at any reasonable time during the usual business hours of the Trustee.

Section VIII. The Depositor shall be entitled to receive from the Trustee all interest allowed on deposits in all of the various accounts hereunder, to provide it with funds to cover the ordinary routine expenses of the Depositor hereunder. Such interest shall be at rates currently allowed by the Trustee on deposits of similar amounts and character.

SECTION IX. The Depositor and the Trustee may each become owners of Trust Shares Certificates with the same rights and privileges as other holders thereof.

Section X. Neither the Trustee nor the Depositor shall be liable for any payments made by either of them, or suffered by either of them to be made by any of the Companies, in good faith to any duly empowered fiscal authority, for taxes upon the stock of the Companies deposited hereunder, or upon said Trust Shares Certificates, and/or dividends (whether in cash or stock or otherwise) payable thereon.

Section XI. The Trustee and the Depositor may rely upon the advice of solicitors or counsel, who may be solicitors or counsel for the Trustee or for the Depositor or for any of the Companies, and upon statements of accountants, brokers and other persons believed by it or them in good faith to be expert in relation to the matter upon which they are consulted; and for anything done or suffered in good faith based on such advice and/or information, neither the Trustee nor the Depositor shall be liable to anyone.

SECTION XII. For anything done or suffered by the Depositor in good faith in accordance with the request or

^{*} See Supplemental Agreement pp. S1, S2.

advice of, or based upon information furnished by the Trustee or any of the Companies, the Depositor shall not incur liability to anyone. For anything done or suffered by the Trustee in good faith in accordance with the request or advice of, or based upon information furnished by the Depositor or any of the Companies, the Trustee shall not incur liability to anyone. By no implication or construction whatsoever shall any liability to anyone be placed upon the Depositor or Trustee under this Agreement, except for wilful malfeasance or gross negligence.

SECTION XIII. The Trustee is authorized to act and shall be protected in acting upon any notice, request, consent, sworn statement, certificate, order, affidavit, letter, telegram, or other paper or document believed by it to be genuine and correct and to have been signed and sent by the proper person or persons.

SECTION XIV. As to the existence or non-existence of any fact or as to the sufficiency or validity of any instrument, paper or proceedings, unless other evidence is specifically required, the Trustee shall be entitled to rely upon a certificate of the Depositor signed by its President, or a Vice-President or Treasurer, or an Assistant Treasurer, as sufficient evidence of the facts therein stated. The Trustee may accept a certificate of the Secretary of the Depositor under its seal to the effect that a resolution in the form therein set forth has been adopted by the Directors or by the stockholders thereof as conclusive evidence that said resolution has been duly adopted, and is in full force and effect. The Trustee may rely upon the opinion and advice of any attorney, appraiser, accountant, or other expert whether retained or selected by the Trustee, or by the Depositor or otherwise, and shall not be responsible for any loss resulting from any action or nonaction in accordance with any such opinion or advice.

SECTION XV. The Trustee shall not be liable for any action taken in good faith and believed to be within the dis-

cretion or power conferred upon it by this Agreement, or be responsible for the consequence of any oversight or error of judgment and the Trustee shall not be answerable for the acts, neglects or defaults of any attorney, counsel or any other person employed by it and selected with reasonable care.

Section XVI. The Trustee shall not be deemed to have notice or knowledge of any fact unless written notice thereof be presented to it and wherever in this Agreement reference is made to notice to or the knowledge of the Trustee, the same shall be deemed to mean written notice to the Trustee.

Section XVII. No purchaser, corporation or officer or transfer agent thereof, dealing with the Trustee, shall be bound to make any inquiry, concerning the validity of any sale purporting to be made by the Trustee or be liable for the application of money received by the Trustee.

Section XVIII. In the event that the Trustee shall be relieved and discharged as Trustee hereunder by any competent Court, the Depositor may appoint a substitute Trustee, and shall cause notice of such appointment to be published at least once a week for four successive calendar weeks in a daily newspaper published and of general circulation in the City of Philadelphia, Pennsylvania, and shall otherwise give notice to the holders of registered Trust Shares Certificates in the manner herein provided.

Section XIX. Every substitute Trustee appointed by the Depositor pursuant to Section XVIII of this Article; shall be a bank or trust company with trust powers incorporated under the laws of the United States of America or of the Commonwealth of Pennsylvania. Upon the appointment of a substitute Trustee, all rights, powers and duties of the Trust hereunder with respect to all the deposited property shall immediately vest in the substitute Trustee; the relieved or discharged Trustee, thereupon at the written request of the new Trustee, and upon payment to it of all

its proper charges and expenses, shall deliver all of the deposited property to the said substituted Trustee accompanied by all necessary and convenient instruments of assignment and transfer, together with such other instruments in writing as may be appropriate to vest or confer in the new Trustee all powers and duties of the Trustee hereunder, with respect to all securities, monies and properties of every kind held by the retiring Trustee, and together with all of the necessary records, books and ledgers, to enable the substituted Trustee to conveniently carry on the business of the administration of the Trust hereunder.

Section XX. The term "Trustee" shall mean the Trustee herein named and its successors for the time being in the Trust hereby created, and also any substitute Trustee as provided herein. The term "Depositor" shall mean "Independence Shares Corporation," its successors and assigns.

SECTION XXI. This Agreement may be amended by the Depositor to change the name "Independence Trust Shares" without the consent of the holders of Trust, Shares Certificates.

. ARTICLE EIGHT.

GENERAL PROVISIONS.

Section I. Pending the preparation of definitive certificates, the Trustee may execute and deliver to the Depositor or upon its order in lieu of definitive certificates but subject to the same provisions, limitations, and conditions, as definitive certificates, one or more temperary printed or typewritten certificates, substantially of the tenor of the certificate hereinabove recited, and with such omissions, insertions and variations from the form of such certificate so recited, as may be appropriate or any other temporary evidence of title to or ownership in the Trust Shares herein provided for. Each such temporary certificate shall bear on its face an appropriate legend showing that it is a tem-

porary certificate exchangeable for a definitive certificate or certificates, when prepared.

Upon surrender of any temporary certificate or certificates, at the office of the Trustee, for exchange, the Trustee will execute and deliver in exchange therefor, without expense to the holder thereof, definitive certificates, representing in the aggregate the same number of Trust Shares as the temporary certificate or certificates so surrendered. Until so exchanged, temporary certificates shall be entitled in all respects to the same benefits of this Agreement as the definitive certificates issued hereunder. Temporary certificates shall be registered in the same manner as herein provided for definitive certificates. All temporary certificates surrendered in exchange for definitive certificates shall be forthwith cancelled by the Trustee.

Section II. If any Trust Shares Certificate shall be mutilated, lost or destroyed, the same may be renewed on such evidence being produced as the Trustee and the Depositor shall require; and, in case of mutilation, on the surrender of the old certificate and, in case of loss or destruction, on the execution and delivery to the Trustee and the Depositor of such indemnity, if any, as the Trustee and the Depositor may require; and, in either case, on payment of such sum not exceeding Two Dollars (\$2.) per certificate as the Trustee and the Depositor may require. In case of loss the person availing himself of the provisions of this paragraph shall also pay to the Trustee and the Depositor all expenses incident to the investigation of the evidence of loss.

Section III. Any notice required to be given hereunder by the Trustee to the Depositor, or by the Depositor to the Trustee shall be in writing and may be given by registered mail addressed, to the Depositor or to the Trustee as the case may be, at the Depositor's address in Philadelphia, Penna., or at any address subsequently filed with the Trustee by the Depositor, or, in the case of the Trustee, at

the principal office of the Trustee in Philadelphia, Pennsylvania. Any notice required to be given hereunder by the Trustee or by the Depositor to the holders of Trust Shares Certificates shall be sufficient if given in writing and mailed to the last known address of such holders.

Section IV. The term "stock" as used in this Agreement shall be deemed to include allotment certificates, interim receipts and voting trust certificates representing any of such stock and/or certificates of a trustee, committee or other depository with which such stock, alone or with that of an affiliated corporation, has been deposited.

Section V. In the event of any changes in the composition of the Stock Unit, an appropriate notice thereof shall be given by the Trustee to the registered holders of Trust Shares Certificates at the time of the next following semi-annual distribution, and such change shall be appropriately noted on all Trust Shares Certificates issued by the Trustee following any such change.

ARTICLE NINE

EXECUTION.

Section I. This Agreement may be executed in two or more counterparts, each of which when so executed shall be deemed to be an original, but such counterparts shall together constitute but one and the same instrument. The date of this Agreement is intended as the date of the identification hereof and is not intended to indicate that it was executed and delivered on said date, nor that the Trust Shares were authorized on or before said date, this Agreement being executed and delivered as of the date of the acknowledgment hereof, and this Agreement shall be fully effective for all purposes hereof from the date of such acknowledgment by the Trustee.

IN WITNESS WHEREOF, the Depositor and the Trustee have caused this Agreement to be signed by their respective

Presidents or Vice-Presidents and their respective corporate seals to be hereunto duly affixed, and attested by their respective Secretaries or Assistant Secretaries, as of the day and year first above written.

INDEPENDENCE SHARES COR-PORATION,

By

ROBERT F. HOLDEN,

President.

(SEAL)

Attest:

R. N. LANDRETH, Secretary.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

By

JOHN H. MASON, Vice-President.

(SEAL)

Attest:

L. J. CLARK, Secretary.

EXHIBIT "A."

THE PORTFOLIO.

Aetna Life Insurance Company (Hartford) Allied Chemical & Dye Corporation Allis Chalmers Manufacturing Company American Can Company American Gas and Electric Company American Power & Light Company American Telephone and Telegraph Compan, The American Tobacco Company (Class "B" Stock) The Atchison, Topeka and Santa Fe Railway Company The Atlantic Refining Company Bankers Trust Company (New York) The Borden Company The Chase National Bank of the City of New York The Chesapeake and Ohio Railway Company Consolidated Gas Company of New York Continental-Illinois Bank and Trust Company (Chicago) Corn Products Refining Company Eastman Kodak Company E. I. duPont de Nemours & Company Electric Bond and Share Company Fidelity-Phenix Fire Insurance Company of New York The First National Bank of Boston General Electric Company General Motors Corporation. The Home Insurance Company Insurance Company of North America (Phila.) International Harvester Company The Manhattan Company National Biscuit Company The National City Bank of New York The New York Central Railroad Company The New York Trust Company Pacific Lighting Corporation The Pennsylvania Railroad Company

The Philadelphia National Bank Public Service Corporation of New Jersey Security-First National Bank of Los Angeles Southern Pacific Company Standard Oil Company of California Standard Oil Company of Indiana Standard Oil Company of New Jersey The Texas Corporation Union Carbide and Carbon Corporation Union Pacific Railroad Company The Union Trust Company (Cleveland) The United Gas Improvement Company United States Fidelity and Guaranty Company (Baltimore) United States Steel Corporation Westinghouse Electric & Manufacturing Company F. W. Weolworth Company

EXHIBIT "B."

(Face of Certificate.)

INDEPENDENCE SHARES CORPORATION, DEPOSITOR

Incorporated under the Laws of the State of Delaware.

Certificate No.

Trust Shares

Registered Certificate

for

Independence Trust Shares.

The Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee.

This Certifies That is the owner of Independence Trust Shares, each fully paid and each representing a one-thousandth (1/1000) interest in one Deposit Unit consisting, on the date hereof, of shares of common stock of the Companies and other property and cash as specified on the reverse

hereof, held by The Pennsylvania Company for Insurances on Lives and Granting Annuities (hereinafter termed the "Trustee"), under the terms of ar agreement and declaration of Trust (hereinafter termed the "Agreement") dated as of April 2, 1930, between Independence Shares Corporation (hereinafter termed the "Depositor") and the said Trustee, which agreement is hereby made a part hereof with the same force and effect as if herein set out in full, to all the terms, conditions, and provisions whereof the holder of this certificate by his acceptance hereof expressly assents and agrees. A duplicate original copy of said Agreement is open to the inspection of the registered holder hereof at the principal office of the Trustee in the City of Philadelphia during usual business hours.

On April 1 and October 1 of each year to and including April 1, 1950, unless the Trust under said Agreement is sooner terminated, the Trustee will pay to the registered holder hereof (of record on the next preceding March 1st or September 1st as the case may be) the appropriate proportional part of all Distributable Funds, as defined in said Agreement, in the hands of the Trustee at the close of the business day on the next preceding February 28th or August 31st as the case may be. The transfer books for the registration and transfer of Trust Shares shall finally close at the close of business on August 31st, 1950. March 1st, 1950, the Trustee will proceed to sell all property held by it under said Agreement and on October 1. 1950 upon surrender hereof will pay to the registered holder hereof the appropriate proportional part of the then Distributable Funds applicable to the Trust Shares evidenced by this Certificate. At any time prior to the termination of the Trust under said Agreement, the registered holder hereof, upon giving three days notice in writing to the Trustee and upon the surrender hereof, is entitled to receive the cash redemption value of the Trust Shares evidenced by this Certificate. At any time prior to March 1, 1950, or the prior termination of the said Agreement, the

registered holder of a Trust Shares Certificate or Certificates representing one thousand Trust Shares, upon giving the Trustee ten days notice in writing, and upon surrender of said Certificates, and upon payment to the Trustee of taxes, duties, transfer charges and fees, is entitled to receive, duly endorsed, and in proper form for transfer all the shares of stock then constituting one Stock Unit, and a sum in cash equivalent to the cash value of one Distribution Unit.

The Trust Shares evidenced by this Certificate are transferable on the books of the Trustee, maintained for such purpose, by the holder hereof in person or by Attorney, upon surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF Independence Shares Corporation has caused this Certificate to be signed in its name by an authorized officer.

> INDEPENDENCE SHARES COR-PORATION,

> > By

Dated

19 . Philadelphia, Pa.

This certificate is one of the certificates referred to in the within mentioned Agreement and Declaration of Trust. The property described on the reverse hereof has been deposited with this Company thereunder.

> THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

> > By

Assistant Secretary.

(Back of Certificate.)

The Deposit Unit, referred to on the face hereof is composed of the following property and cash: A. One Stock Unit which consists of one (1) share of the common capital stock of each of the following corporations:

Aetna Life Insurance Company (Hartford) Allied Chemical & Dye Corporation Allis-Chalmers Manufacturing Company American Can Company American Gas and Electric Company American Power & Light Company American Telephone and Telegraph Company American Tobacco Company, The (Class "B" Stock) Atchison, Topeka and Santa Fe Railway Company, The Atlantic Refining Company, The Bankers Trust Company (New York) Borden Company, The Chase National Bank of the City of New York, The Chesapeake and Ohio Railway Company, The Consolidated Gas Company of New York. Continental-Illinois Bank and Trust Company (Chicago) Corn Products Refining Company Eastman Kodak Company E. I. duPont de Nemours & Company Electric Bond & Share Company Fidelity-Phenix Fire Insurance Company of New York

First National Bank of Boston, The
General Electric Company
General Motors Corporation
Home Insurance Company of New York
Insurance Company of North America (Phila.)
International Harvester Company
Manhattan Company, The
National Biscuit Company
National City Bank of New York, The
New York Central Railroad Company, The

New York Trust Company, The Pacific Lighting Corporation Pennsylvania Railroad Company, The Philadelphia National Bank, The Public Service Corporation of New Jersey Security-First National Bank of Los Angeles Southern Pacific Company Standard Oil Company of California Standard Oil Company of Indiana Standard Oil Company of New Jersey Texas Corporation, The Union Carbide & Carbon Corporation Union Pacific Railroad Company Union Trust Company, The (Cleveland) United Gas Improvement Company, The United States Fidelity and Guaranty Company (Baltimore) ~United States Steel Corporation Westinghouse Electric and Manufacturing Company Woolworth Company, F. W.

and B: One Distribution Unit which consists of (1) a sum, in cash equal to the cash dividends paid on the stocks comprising the Stock Unit and received by the Trustee since the next preceding February 28th or August 31st, and (2) all stock dividends, subscription rights, securities and other rights and property (excepting cash) distributed by the Companies comprising the Stock Unit since the next preceding February 28th or August 31st, or the equivalent in cash of the net market value thereof, or the net cash proceeds from the sales thereof, received by the Trustee since the next preceding February 28th or August 31st, all as provided in the said Agreement referred to on the face hereof.

ORIGINAL AGREEMENT RELATING TO TRUSTEE'S FEES AND SPECIAL REDEMPTION FUND.

This Agreement dated as of the 2nd day of April, 1930, made by and between

INDEPENDENCE SHARES CORPORATION

a Corporation duly organized and existing under the laws of the State of Delaware, hereinafter referred to as the Depositor, and

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES

a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called the Trustee, Witnesseth:

Whereas, The Depositor and the Trustee have entered into a certain Trust Agreement of even date, copy of which is hereto attached and made a part hereof, and

Whereas, The said Trust Agreement makes no provision for the compensation of the Trustee thereunder and further makes no provision for any fund to provide for the redemption of Trust Shares Certificates, as provided in Section 3, Article 6 of said Trust Agreement.

Now THEREFORE, In Consideration of the premises, and of the mutual covenants of the parties, it is hereby agreed as follows:

COMPENSATION OF TRUSTEE.

ARTICLE 1.

The Depositor will pay to the Trustee as compensation for its charges and for its services rendered in connection with the administration of the Trust property deposited under the aforementioned Trust Agreement, as follows:

- · (a) One cent (1¢) per share for each Independence Trust Share issued.
- (b) In addition thereto, one-half cent $(\frac{1}{2}\phi)$ semi-annually per share for each Trust Share outstanding February 28th and August 31st of each year up to and including the number of one million (1,000,000) shares; as to shares outstanding in excess of one million (1,000,000) and up to and including two million (2,000,000) three eighths of one cent $(\frac{3}{8}\phi)$ per share semi-annually; and as to all shares outstanding in excess of two million (2,000,000) up to and including three million (3,000,000) one-fourth of one cent $(\frac{1}{4}\phi)$ per share semi-annually; and as to all shares outstanding in excess of three million (3,000,000) one eighth of one cent $(\frac{1}{8}\phi)$ per share semi-annually.

As to compensation for the issue of new shares, such compensation shall be paid as to new shares issued during the six months ending with February 28th and August 31st in each year, and payment therefore shall become due and payable on the next following April 1st and October 1st as the case may be.

As to semi-annual compensation on shares outstanding, such compensation shall be computed as of February 28th of each year and payment shall become due and payable on the next following April 1st, and as to compensation computed as of August 31st, payment shall become due and payable on the next following October 1st.

The Trustee is hereby authorized to retain the compensation above provided for from payments payable by the Trustee, pursuant to the said Trust Agreement to the Depositor.

DEPOSITORS REDEMPTION FUND.

ARTICLE 2.

1. Coincidentally with the execution and delivery of this Agreement, Depositor shall deposit with the Trustee

in an account to be entitled Depositors Redemption Fund the sum of Ten thousand dollars (\$10,000.).

- 2. The Depositors Redemption Fund shall at all times be the sole property of the Depositor, and shall not for any purposes be deemed a part of the trust property under the said Trust Agreement.
- 3. The Trustee is empowered and authorized to withdraw monies from the Depositors Redemption Fund, but only for the purposes of Section MI of Article 6 of the said Trust Agreement.
- 4. In case any holder of a Trust Shares Certificate or Certificates representing less than one thousand (1000) Trust Shares shall surrender his Certificate or Certificates for redemption as provided in Section III of Article 6 of said Trust Agreement, properly endorsed in blank, the Trustee is hereby authorized to pay to such holder, in cash from the Depositors Redemption Fund, a sum equal to the Redemption Value (as defined in the Trust Agreement) of the shares so surrendered, and the Trustee shall hold the said shares for the account of the Depositor and shall forthwith notify the Depositor of such transaction.
- 5. The Depositor upon reimbursing the Depositors Redemption Fund to the extent of the amount withdrawn for cash redemption shall have the right to have shares surrendered for redemption transferred to it or upon its order.
- 6. When and in case the Trustee shall have, by such redemptions, accumulated a total of one thousand (1000) shares, and the Depositor shall have neglected to have the shares transferred to it or upon its order as provided for immediately above, the Trustee shall for and on behalf of the Depositor surrender such one thousand (1000) shares for cancellation and shall withdraw one deposit unit from

the deposited property, liquidate the same as expeditiously as possible and deposit the proceeds of said liquidation in the Depositors Redemption Fund.

INTEREST TO DEPOSITOR.

ARTICLE 3.

- 1. The Trustee shall allow and pay to the depositor semi-annually on April 1st and October 1st of each year, interest on the balances in the Depositors Redemption Fund at such rate or rates (but not less than the rate of 4% per annum) from time to time allowed by it on time deposits of similar amounts.
- 2. The Trustee shall allow and pay to the Depositor semi-annually on April 1st and October 1st of year, interest on all the various funds maintained pursuant to the said Trust Agreement, at such rate or rates (but not less than the rate of 3% per annum) from time to time allowed by it on time deposits of similar amounts.
- 3. Wherever the term time deposits is used herein it shall be defined as the term is generally used by bankers. at the time of the then current interest period.

EXECUTION.

ARTICLE 4.

The date of this agreement is intended as the date of the identification hereof and is not intended to indicate that it was executed and delivered on said date. This agreement shall be fully effective for all purposes hereof from the date of actual execution and delivery hereof.

IN WITNESS WHEREOF, The Depositor and the Trustee have caused this agreement to be signed by their respective Presidents or Vice-Presidents and their respective seals to

be hereunto duly affixed, and attested by their respective Secretaries of Assistant Secretaries, this 23rd day of May, 1930.

INDEPENDENCE SHARES CORPORATION,

By ROBERT F. HOLDEN,

President.

Attest:

R. N. LANDRETH, (Seal) Secretary.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

> By John H. Mason, Vice-President.

Attest:

L. J. CLARK,

(Seal) Secretary.

SUPPLEMENTAL AGREEMENT.

THIS AGREEMENT dated this 24th day of November, 1930, made by and between

INDEPENDENCE SHARES CORPORATION

a Corporation duly organized and existing under the laws of the State of Delaware, hereinafter referred to as the Depositor, and

THE PENNSYLVANIA COMPANY

FOR INSURANCES ON LIVES AND GRANTING ANNUITIES a Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called the Trustee, WITNESSETH:

WHEREAS, The Depositor and the Trustee have entered into a certain Agreement and Declaration of Trust dated as of April 2, 1930, relating to the issuance of Independence Trust Shares, a copy whereof, for convenience of reference is hereto attached, and the said Trust Agreement provides, inter alia, that the Depositor shall be entitled to receive from the Trustee interest on the Distribution Account thereunder, and the Depositor desires to waive its right to receive said interest, and to make appropriate provision that such interest shall inure to the benefit of the owners of Independence Trust Shares, and the Trustee is willing to receive such interest and administer and apply the same for the benefit of the owners of Independence Trust Shares.

Now THEREFORE, FOR AND IN CONSIDERATION of the premises, and of the mutual covenants of the parties, it is hereby agreed as follows:

I. The Depositor hereby waives its right to receive interest on the Distribution Account as provided in the said Trust Agreement.

II. The Depositor hereby releases and discharges the Trustee from any duty or obligation to pay interest on the Distribution Account to it, the said Depositor.

III. The Trustee agrees and declares that it will allow interest on the Distribution Account under the said Trust Agreement, at rates currently allowed by it on time deposits of similar amounts and character.

IV. The Trustee does hereby agree that it will pay into or credit to the Distribution Account such interest as is allowed from time to time and hold, administer and apply the same for the benefit of the owners of Independence Trust Shares in the same manner as if such interest had been provided for the benefit of the owners of Independence Trust Shares under the terms of the Trust Agreement.

V. This Agreement shall terminate with the termination of the Trust Agreement herein referred to.

IN WITNESS WHEREOF, The Depositor and the Trustee have caused this Agreement to be signed by their respective Presidents or Vice-Presidents and their respective corporate seals to be hereunto affixed, and attested by their respective Secretaries or Assistant Secretaries as of the day and year first above written.

INDEPENDENCE SHARES CORPORATION,

By ROBERT F. HOLDEN,

President.

Attest:

R. N. LANDRETH, (Seal) Secretary.

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

By Frank G. SAYRE,

Vice-President.

Attest:

Lewis M. Evans,
(Seal) Asst. Secretary.

PREAMBLE AND RESOLUTION AFFECTING SEMI-ANNUAL ADMINISTRATION FEE.

MEETING OF THE BOARD OF DIRECTORS OF MAY 27TH, 1931.

WHEREAS, it has come to the attention of this Board of Directors that Section III of Article Seven of the Agreement and Declaration of Trust, under which Independence Trust Shares are issued, has been, from time to time, erroneously construed as creating a fixed semi-annual charge of 1½¢ per trust share outstanding, against the distribution account, under the said Trust Agreement, and

Whereas, such a construction of said Section III is not consistent with the true purpose of the said provision and is contrary to the true intent of this corporation, and

WHEREAS, the members of this Board deem it advisable that the true purpose of the said provision and the true intent of this corporation in respect thereto be more fully set forth and be made known to all persons and bodies corporate concerned,

RESOLVED, That the true purpose of Section III of Article Seven of the Trust Agreement, which here follows:

"Section III. The Depositor shall be entitled to charge not in excess of one and one-half (1½¢) cents semi-annually for each Trust Share outstanding on February 28th and August 31st of each year as an administration fee hereunder, out of which sum the Depositor shall pay the Trustee its fees for its services hereunder; but the Depositor shall have the right to charge less than such amount if it so elects. Said administration fee as fixed by the Depositor from time to time, under the terms of this section, shall be deducted from the funds in the Distribution Account and shall be paid by the Trustee to the Depositor on April first and October first of each year."

is to provide a current source of funds to meet the reasonable, proper and necessary expenses incident to the continuing maintenance of the Trust, and to provide a just, fair and reasonable compensation to this Corporation for services rendered from time to time in connection with the continuing management of the Trust, and

FURTHER RESOLVED, That the true intent of this Corporation in respect thereto is to provide a reasonable, proper and adequate management of the Trust throughout the life thereof at the lowest cost consistent with the best interests of the owners of Independence Trust Shares, and

FURTHER RESOLVED, Subject, however, to the right of the Depositor to change and modify the instructions which here follow, under circumstances which in the discretion of this Corporation, with the approval of the Trustee, require that a change or modification be made in order to better provide for the continuing maintenance of the Trust, and subject always to the maximum limitation set forth in Section III of Article Seven of the Agreement and Declaration of Trust, the officers of this Corporation be and are hereby instructed to fix the semi-annual administration fee from time to time in accordance with the following instructions:

- 1. The administration fee shall not be in excess of the total of the reasonable, proper and necessary expenses of this Corporation incident to the continuing maintenance of the Trust, and a just, fair and reasonable compensation to this Corporation for services rendered from time to time in connection with the continuing management of the Trust.
- 2. The administration fee for each semi-annual period shall not be in excess of two and one-half per cent $(2\frac{1}{2}\%)$ of the currently distributable income as defined in paragraph five hereof, unless such two and one-half per cent $(2\frac{1}{2}\%)$ of the distributable income be inadequate to meet

the reasonable, proper and necessary expenses incident to the continuing maintenance of the Trust, in which event

- 3. there may be included in such administration fee for such semi-annual period a portion of the current distributions of principal, as defined in paragraph six hereof, which portion shall not exceed two and one-half per cent (2½%) of such current distributions of principal.
- 4. No charge shall be made on behalf of this Corporation as compensation for its current services in connection with the continuing maintenance of the Trust, unless the said two and one-half per cent (2½%) of income be adequate to pay not only such compensation to this Corporation but also all expenses of maintenance of the Trust.
- 5. For the purposes of these instructions, "Distributable Income" shall be taken to mean all cash dividends paid by the Companies of the portfolio of the Trust (excepting dividends distributed in liquidation or in dissolution of the said Companies, partial or otherwise), received by the Trustee during the six months period in respect of which the current semi-annual distribution is made, together with interest on the Distribution Account for such period.
- 6. For the purposes of these linstructions, "Distributable Principal" shall be taken to mean the net cash proceeds of the sales of any stocks, securities, rights or other property required to be sold under the Trust Agreement and any dividends received by the Trustee in liquidation or in dissolution, partial or otherwise, of any of the Companies of the portfolio received by the Trustee during the six months period in respect of which the current semi-annual distribution is made.

FURTHER RESOLVED, That the foregoing resolution be and is hereby declared to be binding upon this Corporation, its successors and assigns with the same force and effect

as if the terms of the foregoing resolution were incorporated in the aforesaid Agreement and Declaration of Trust.

FURTHER RESOLVED, That the officers of Independence Shares Corporation be and are hereby authorized to make known the substance of the foregoing resolutions to all persons and bodies corporate who now are or in the future may be concerned with or in the Trust which forms the foundation for the issuance and maintenance of Independence Trust Shares.

This is to certify that the foregoing preamble and resolutions are true and correct excerpts from the minutes of the meeting of the Board of Directors of Independence Shares Corporation held May 27th, 1931, at which meeting

there was a quorum present.

Paul H. Myrick, Secretary.

(Seal)

SECOND SUPPLEMENTAL AGREEMENT.

THIS AGREEMENT dated this 8th day of June, 1931 between

INDEPENDENCE SHARES CORPORATION

a Corporation duly organized and existing under the laws of the State of Delaware, hereinafter referred to as the Depositor, and

THE PENNSYLVANIA COMPANY

FOR INSURANCES ON LIVES AND GRANTING ANNUITIES

a Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called the Trustee, Witnesseth:

Whereas, The Depositor and Trustee have entered into a certain Agreement and Declaration of Trust dated as of April 2nd, 1930, relating to the issuance of Independence Trust Shares, a copy whereof for convenience of reference is hereto attached and which for purposes of identification is herein referred to as Trust Agreement, and

Whereas, The Depositor and Trustee have entered into a certain Agreement supplemental thereto, dated November 24th, 1930, a copy whereof for convenience of reference is hereto attached and which for purposes of identification is hereinafter referred to as Supplemental Agreement, and

WHEREAS, The Trust Agreement provides in Article HI, Section Three as follows:

"The Trustee shall hold all moneys deposited with it or received by it hereunder, as a general deposit until required to disburse the same in accordance with the provisions of this Agreement, and the requirements of any rule or law or statute now of hereafter in force regarding the investment or segregation of trust funds shall not apply to such moneys."

and ...

WHEREAS, It has been the practice in fact for the Trustee to hold all such moneys as trust property, and

WHEREAS, The said Trust Agreement does not in specific terms provide for the giving of notice to the holders of Trust Shares as to the termination of the trust, and

WHEREAS, It is the intention of the parties hereto to make appropriate provision for the further protection and safeguarding of the interests of the holders of Independence Trust Shares Certificates,

Now, THEREFORE, IN CONSIDERATION of the premises, and of the mutual covenants of the parties, it is hereby agreed as follows:

- 1. The specific terms of Article III, Section Three not-withstanding, the Trustee shall hold all moneys deposited with it or received by it under the said Trust Agreement as trust property until required to disburse the same in accordance with the provisions of the said Trust Agreement, but the Trustee shall be required to pay interest only at such rate or rates from time to time allowed by it on time deposits of similar amounts. The term "time deposit" as used herein, is hereby defined as the term is generally used by bankers at the time of the then current interest period.
- 2. That thirty days prior to the final termination of the Trust as a whole, the Trustee shall give notice to the registered holders of Independence Trust Shares Certificates of the date of the final distribution of the trust property by (a) placing in a United States Post Office, or any substation thereof, in a postpaid sealed wrapper, addressed to each registered holder of Independence Trust Shares Certificates, to the address appearing on the books of registry of the Trustee an appropriate notice relating to such final distribution and, (b) causing an appropriate notice of such final distribution to be published in a daily newspaper, printed in the English language, of general cir-

culation in the Borongh of Manhattan, City and State of New York, and in such a newspaper published in the City of Philadelphia, Pennsylvania, and in such a newspaper published in each City of the United States of America in which it appears, according to the books of registry of the Trustee, that there reside one thousand (1,000) or more holders of Independence Trust Shares Certificates, and in a newspaper of general circulation published in the capital cities of each foreign country in which it appears from the books of registry of the Trustee that there reside in such country one thousand (1,000) or more holders of Independence Trust Shares Certificates.

It is understood by the parties hereto that the cost of such notice is a property item of expense incident to the termination of the Trust and as such may be deducted by the Trustee from the Distribution Fund under the Trust, pursuant to Section IV of Article Five of the Trust Agree-

ment.

- 3. The Trustee agrees that in all practicable cases, and consistent with the safeguarding of the interests of the holders of Independence Trust Shares, sales of securities and other property required to be sold under the terms of the Trust Agreement will be made through a recognized Exchange, and delivery of and payment for such security will be between the Trustee and the broker or dealer or other purchaser.
- 4. The Depositor and the Trustee agree that neither the Depositor nor the Trustee will rely, in any matter affecting the holders of Trust Shares Certificates, upon the opinion of counsel, excepting in purely legal matters.
- 5. The Depositor agrees, when and as, in accordance with the terms of the Trust Agreement, securities are to be eliminated from the Trust, that it will secure the consent of the Trustee in respect to the time, place and manner in which the said eliminated securities shall be sold, subject always to such restrictions as may be contained in the

original Trust Agreement, and provided that this section shall not, under any circumstances whatsoever, be construed to impose any liability upon the Trustee or the Depositor as the result of the giving or withholding of such consent by the Trustee, except, in the case of each, as to their own gross negligence or wilful malfeasance.

- Agreement shall be known as Second Supplemental Agreement.
- 7. This Agreement shall terminate with the termination of the Trust Agreement herein referred to.

IN WITNESS WHEREOF, The Depositor and the Trustee have caused this Agreement to be signed by their respective Presidents or Vice-Presidents and their respective corporate seals to be hereunto affixed, and attested by their respective Secretaries or Assistant Secretaries, as of the day and year first above written.

INDEPENDENCE SHARES COR-PORATION,

> By ROBERT F. HOLDEN, President

Attest:

R. N. LANDRETH, (Seal) Secretary.

FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

By Francis Sayre, Vice-President.

Attest:

Lewis M. Evans, (Seal) Asst. Secretary.

AGREEMENT RELATING TO MODIFICATION OF TRUSTEE'S FEES.

This Agreement dated this 8th day of June, 1931, made between

INDEPENDENCE SHARES CORPORATION

a Corporation duly organized and existing under the laws of the State of Delaware, hereinafter referred to as the Depositor, and

THE PENNSYLVANIA COMPANY

FOR INSURANCES ON LIVES AND GRANTING ANNUITIES

a Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, hereinafter called the Trustee, Witnesseth:

Whereas, The Depositor and the Trustee have entered into a certain Agreement dated as of the second day of April, 1930, relating, inter alia, to provision for the compensation of the Trustee for its services in connection with a certain Agreement and Declaration of Trust dated as of April 2nd, 1930, between the Depositor Corporation and the Trustee, which latter agreement is hereinafter referred to as Trust Agreement, and

Whereas, It has become expedient that the Depositor Corporation express the semi-annual administration fee provided in the said Trust Agreement in terms of percentage of income, rather than in terms of cents per Trust Share in order to conform to recent developments in the field of fixed investment trusts, and

Whereas, The parties hereto believe it to be to their mutual advantage that the existing Agreement relating to the Trustee's compensation be modified in some respects so that the same may be expressed in terms of percentage of income of the Trust.

Now, THEREFORE, IN CONSIDERATION of the premises, and of the sum of One Dollar (\$1.00), and of the mutual covenants of the parties, it is hereby agreed as follows:

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- 1. The Depositor will pay to the Trustee the sum of one cent (1¢) per share for each Independence Trust Share issued as heretofore and as set forth in Article 1, Subsection (a) of the aforementioned Agreement of April 2nd, 1930.
- 2. That portion of the Trustee's fees which is referred to in Article 1, Sub-section (b) of the said Agreement of April 2nd, 1930, for convenience, is hereinafter referred to as Trustee's semi-annual compensation.
- 3. As to each semi-annual distribution period, the Trustee's semi-annual compensation shall be two and one half per cent (2½%) of the then distributable income, but if such sum be less for such distribution period than the aggregate sum then receivable by the Trustee if the same were computed in accordance with Article 1, Subsection (b) of the aforesaid Agreement, then the Trustee's semi-annual compensation shall include in addition thereto up to two and one-half per cent (2½%) of the then distributable principal, provided always that the Trustee's semi-annual compensation so computed shall not exceed the aggregate sum receivable by the Trustee if the same were computed under the schedule set forth in Article 1, Subsection (b) of the aforesaid Agreement, for the same distribution period.
- 4. For the purposes of this Agreement, "Distributable Income" shall be taken to mean all cash dividends paid by the Companies of the Portfolio of the Trust (excepting dividends distributed in liquidation or in dissolution of the said Companies, partial or otherwise), received by the Trustee during the six months period in respect of which the current semi-annul distribution is made, together with interest on the Distribution Account for such period.
- 5. For the purposes of this Agreement, "Distributable Principal" shall be taken to mean the net cash proceeds of the sales of any stocks, securities, rights or other property required to be seld under the Trust Agreement and any

dividends received by the Trustee in liquidation or in dissolution, partial or otherwise, of any of the Companies of the Portfolio received by the Trustee during the six months period in respect of which the current semi-annual distribution is made.

6. The Trustee releases the Depositor from any claims for all compensation for its services under the said Trust Agreement in excess of that computed in accordance with Section 1 and 3 hereof.

7. The terms of the aforementioned Agreement of April 2nd, 1930, and of that certain Supplemental Agreement between the parties hereto, dated November 24th, 1930, be and are hereby confirmed and ratified insofar as the same be not inconsistent with the specific provisions of this Agreement. .

IN WITNESS WHEREOF. The Depositor and the Trustee have caused this Agreement to be signed by their respective Presidents or Vice-Presidents and their respective corporate seals to be hereunto affixed, and attested by their respective Secretaries or Assistant Secretaries, as of the day and year first above written.

> INDEPENDENCE SHARES COR-PORATION,

> > By ROBERT F. HOLDEN, President

Attest:

R. N. LANDRETH,

Secretary. (Seal)

> THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

> > By FRANCIS SAYRE, Vice-President.

Attest:

LEWIS M. EVANS, Asst. Secretary.

THIRD SUPPLEMENTAL AGREEMENT.

This Third Supplemental Agreement, dated this 16th day of December, 1938, between Independence Shares Corporation, a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania (hereinafter referred to as the "Depositor"), and The Pennsylvania Company for Insurances on Lives and Granting Annuities, a corporation also duly organized and existing under the laws of the Commonwealth of Pennsylvania (hereinafter referred to as the "Trustee"), amending and supplementing Agreement and Declaration of Trust between the Depositor and the Trustee, dated as of the second day of April, 1930, Agreement dated as of April 2, 1930, and Agreement dated June 8, 1931,

WITNESSETH:

That in consideration of the premises and of the mutual covenants of the parties hereto, each of the parties hereto intending to be legally bound hereby, parties hereto agree to and with each other as follows:

I. Section II of Article One of the Agreement and Declaration of Trust dated as of April 2, 1930, shall be amended to read as follows:

"Section II. Additional Deposit Units may be deposited with the Trustee by the Depositor from time to time until February 28, 1970 or until prior termination of this Agreement, but each such additional Deposit Unit at the time of deposit must be identical in composition with each of the Deposit Units as they are composed at the close of business of the business day next preceding the date of deposit of each such additional Deposit Unit, and all Deposit Units must be identical, each with the other, at all times."

Section II of Article Five is hereby amended to read as follows:

"Section II. The Term 'Distributable Funds', wherever used in this Agreement, shall mean any cash distributions made by any of the Companies out of surplus earnings or profits or in liquidation or dissolution received by the Trustee during the six months period in respect of which the current semi-annual distribution is made, and also, as to such period, the net cash proceeds of the sale of any stock, securities, rights or other property, required to be sold hereunder, received by the Trustee; but the term Distributable Funds shall not include funds against which distribution checks issued at a prior distribution date are outstanding and unpaid, nor funds set up by the Trustee for payment of taxes or other proper charges under the terms hereof, nor funds required for the reimbursement of the Trustee as provided in Article Seven. Section VI. hereunder, nor funds applied by the Trustee for the purchase of fractions of shares if any be purchased, as authorized by Article Three, Section VII, nor funds payable to the Depositor under Article Seven, Section III, nor any other charges which may be made against such Distributable Funds under the terms of this Agreement. For the purpose of determining what funds are distributable hereunder, cash distributions of any of the Companies shall be considered as received by the Trustee on the date of the receipt of the same by it, and the proceeds of the sale or sales of any property sold hereunder shall be considered as received by the Trustee on the date that such proceeds are paid to the Trustee, and not on the date when the property on which such proceeds were realized, was received by the Frustee."

^{3.} Section IV of Article Five is hereby amended to read as follows:

[&]quot;Section IV. The Trust under this Agreement shall automatically terminate on February 28, 1970,

unless sooner terminated as herein provided. If at any time on or after September 30, 1950, the number of Trust Shares issued and outstanding are less than 500,-000 trust shares, the Trust under this Agreement may be terminated by the Depositor or the Trustee upon a date then specified. Upon the termination of the Trust the Trustee shall discontinue the acceptance of the deposits of additional stock of the companies. Within seven months next succeeding February 28, 1970, or next succeeding the date of termination of the Trust, whichever shall be earlier, the Trustee shall proceed. with the liquidation and sale of all securities then on . deposit with it under the terms and conditions hereof. The transfer books for the registration and transfer of Trust Shares Certificates shall be finally closed upon the date upon which the sale of all of the securities on deposit shall have been consummated and thereafter the Trustee shall not be required to transfer any such Trust Shares Certificates. Thirty days after the date upon which the sale of all of the securities on deposit shall have been consummated, the Trustee shall distribute pro rata all cash proceeds of such sales of securities, together with all cash funds held by it in the Distribution Account, after deduction of any reasonable brokerage fees or commissions which may be paid by. the Trustee, and expenses of the Trustee, in connection with such sales, and after setting up and reserving amounts sufficient in the judgment of the Trustee to cover all taxes, expenses and other charges incident to the termination of the Trust, to the registered holders of outstanding Trust Shares Certificates, upon surrender of certificates to the Trustee and upon payment to it of the amount required to pay any Government and stamp duties and any other taxes of any kind and of any and all transfer fees or charges of any kind, if required; and after the final distribution by the Trustee no further rights shall accrue or belong to holders

of Trust Shares Certificates who fail to present their certificates to the Trustee, except the right to receive a pro rata share of the distribution without interest, subject to the provisions of Section V of this Article.

4. Section V of Article Five is hereby amended to read as follows:

"Section V. In case any certificate or certificates shall not be presented pursuant to Section IV of this Article within six years after the date of the termination of the Trust under this Agreement, the Trustee, upon the written order of the Depositor, shall pay over to the Depositor the moneys, if any payable with respect to such certificate or certificates; provided, however, that the Trustee, before being required to make such payment, may cause notice to be published, at the expense of the Depositor, once a week for four successive calendar weeks (in each case on any day of the week) in a daily newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in such a newspaper published in the City of Philadelphia, Pennsylvania, stating that such moneys have not been claimed and after a date specified therein such moneys will be paid over to the Depositor; and thereafter the holder or holders of such certificate or certificates shall look only to the Depositor for payment thereof. Neither the Trustee nor the Depositor shall be required to pay the holder of any. certificate interest on any moneys so held by the Trustee or paid over by it to the Depositor."

5. Section I of Article Six is hereby amended to read as follows:

"Section I. Until the termination of the Trust under this Agreement the holders of Trust Shares Certificates shall be entitled to receive semi-annual distributions on April first and October first each year, and a final distribution upon termination of said Trust to the extent and in the manner provided in Article. Five hereof."

6. Section II of Article Six is hereby amended to read as follows:

"Section II. At any time prior to the date of termination of the Trust under this Agreement, any registered holder of Trust Shares Certificates representing One Thousand (1000) Trust Shares, upon surrender thereof for conversion, and upon payment in cash to the Trustee of the amount required to pay any Government or stamp duties or other taxes of any kind. all transfer charges and fees of any kind if required, shall be entitled to receive, duly endorsed, and in proper form for transfer, all the shares of the stocks deposited with the Trustee then constituting one Stock Unit, and a cash sum equivalent to the cash value of one Distribution Unit, as of the close of business on the date of surrender of said certificates upon giving to the Trustee ten days notice in writing, accompanied by deposit of said Trust Shares Certificates, of the intention of the holder to surrender said certificates and upon such surrender such certificates shall forthwith be cancelled by the Trustee."

7. Section III of Article Six is hereby amended to read as follows:

"Section III. At any time prior to the date of the termination of the Trust under this Agreement, the registered holder of any Trust Shares Certificates, upon giving the Trustee notice in writing, accompanied by the deposit and surrender of the Trust Shares Certificates duly endorsed and a payment in cash to the Trustee of the amount required to pay any Government or stamp tax duties or other taxes of any kind, that such Trust Shares Certificates are deposited and

surrendered for redemption, shall, not more than three (3) days after the date of such deposit and surrender, be entitled to receive cash in an amount equivalent to the redemption value per share so offered for redemption as of the close of business on the date of such deposit and surrender. The Trustee shall, immediately upon the deposit and surrender of such certificates for redemption, notify the Depositor of such event and the Depositor shall have an option to purchase such shares at any time during such three day period by paying to such holder the cash redemption value which would otherwise have been paid by the Trustee."

- 8. The form of the Trust Shares Certificates issuable under the Trust Agreement shall be appropriately modified and amended so as to incorporate the changes required by this Third Supplemental Agreement and for the time being Trust Shares Certificates may be issued in their present form with an appropriate legend endorsed thereon giving notice of this Third Supplemental Agreement.
- 9. Section 1 and Section 2 of Article 3 of the Original Agreement relating to Trustee's fees and Special Redemption Fund, dated as of April 2, 1930, and Section III of Supplemental Agreement, dated November 24, 1930, both between the Depositor and the Trustee, are superseded and amended, as follows:

"It is agreed in view of the provisions of the Federal Banking Act of 1933, Section 11 (b), 12 U. S. C. A. (1936), Section 371 (a), as amended, and in view of the Regulations of the Department of Banking of the Commonwealth of Pennsylvania, that on and after the effective date of this Supplemental Agreement no interest will be allowed by the Trustee upon the Distribution Account or upon the Depositors' Redemption Fund or upon any other funds held by the Trustee under the terms of said Trust Agreement."

10. Article 1 of the Original Agreement dated as of April 2, 1930, relating to Trustee's fees and Special Redemption Fund, and the entire Agreement between the parties hereto dated June 8, 1931, relating to modification of Trustee's fees, be and they hereby are terminated, cancelled and superseded by the following:

"Effective on and after March 1, 1939, it is agreed that the Depositor shall be entitled to charge on February 28th and August 31st of each year, as an administration fee, a sum to be computed in accordance with u the standard rates now fixed by the Trustee for transactions involved in the administration of the Trust during the preceding six months period, but in no event shall such fee be in excess of the amount of one cent semi-annually for each Trust Share issued and outstanding on February 28th and August 31st of each year, which fee shall be deducted from the funds in the Distribution Account on April first and October first of each year. The Depositor will pay to the Trustee as compensation for the services of the Trustee under the said Trust Agreement a sum equal to and computed in the same manner as the Depositor's administration fee. and the Trustee is authorized to appropriate such fee from the Distribution Account on April first and October first of each year in full and complete discharge of the obligation of the Depositor to pay the Trustee's compensation under the terms of this Agreement."

11. All of the terms of all of the Agreements herein referred to be and the same hereby are ratified and confirmed insofar as the same are not specifically amended by or are not inconsistent with the specific provisions of this Agreement.

It is understood and agreed that this Agreement shall become effective as at January 3, 1939.

IN WITNESS WHEREOF, the Depositor and the Prustee have caused this Agreement to be signed by their respective

President or Vice-President, and their respective corporate seals to be hereunto affixed and attested by their respective secretaries or Assistant Secretaries, all as of the day and year first above written.

INDEPENDENCE SHARES COR-PORATION,

By ·

ALFRED H. GEARY,

President.

Attest:

ROBERT A. BONNER, Secretary.

(SEAL)

THE PENNSYLVANIA COMPANY FOR INSURANCES ON LIVES AND GRANTING ANNUITIES,

By

F. H. Shields, Vice-President.

Attest:

Lewis M. Evans,
Assistant Secretary.

(SEAL).

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SUPREME COURT OF THE UNIT. D STATES.

Nos. 17, 18.—Остовев Терм, 1940.

Robert J. Deckert, et al.

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vs.

Independence Shares Corp., et al.

Robert J. Deckert, et al.

18.

. 18.

The Pennsylvania Company for Insurances on Lives and Granting Annuities.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1940.]

Mr. Justice MURPHY delivered the opinion of the Court.

Two important questions are presented by these petitions. The first is whether the Securities Act of 1933 (48 Stat. 74) authorizes purchasers of securities to maintain a suit in equity to rescind a fraudulent sale and secure restitution of the consideration paid, and to enforce the right to restitution against a third party where the vendor is insolvent and the third party has assets in its possession belonging to the vendor. The second question is whether such purchasers must show that the amount in controversy exceeds \$3,000 exclusive of interest and costs as required by Section 24 of the Judicial Code as amended (28 U. S. C. § 41).

Petitioners, with one exception residents of Pennsylvania, are owners and holders of Capital Savings Plan Contract Certificates purchased from Capital Savings Plan, Inc., since merged with and now Independence Shares Corporation, a Pennsylvania corporation. These certificates required the holders to make certain installment payments to The Pennsylvania Company for Insurances on Lives and Granting Annuities, also a Pennsylvania corporation. Pennsylvania, after deducting certain fixed charges, used the balance of these installment payments to purchase Independence Trust Shares for the benefit of the certificate holders. Independence Trust Shares,

¹ For convenience the three corporations just named will be referred to as Capital, Independence, and Pennsylvania.

issued by Pennsylvania, represented interests in a trust of common stocks of 42 American corporations deposited by Independence with Pennsylvania. Pursuant to trust agreement and indenture between Pennsylvania and Independence, Pennsylvania collected dividends and profits from the stocks and administered the trust.

Petitioners brought this suit in the District Court for the Eastern District of Pennsylvania against Pennsylvania, Independence, two affiliated companies, and certain officers and directors of Independence whose residence does not appear. The action against the

affiliated companies has been dismissed.

The bill alleges that Independence and its predecessor Capital were guilty of fraudulent misrepresentations and concealments in their sale and advertisement of contract certificates to petitioners and others similarly situated in violation of the Securities Act of 1933. It alleges that Independence is insolvent and threatened with many law suits, that its business is virtually at a standstill because of unfavorable publicity, that preferences to creditors are probable, and that its assets are in danger of dissipation and depletion, Petitioners therefore pray the appointment of a receiver for Independence with power to collect and take possession of the assets of Independence and the trust assets held by Pennsylvania, liquidate the assets, determine the claims of petitioners and other certificate holders and pay them, and wind up and dissolve the corporations. They also seek relief incidental to the above and an injunction restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust. There is the usual prayer for general relief.

None of the original petitioners' claims exceeds \$3,000 and respondents contend that the aggregate of all of them will not exceed \$3,000. It is conceded that the assets sought to be reached are greatly in excess of \$3,000.

Respondents answered the bill and thereafter moved to dismiss it. The motions were heard with petitioners' motions for a temporary injunction and the addition of two plaintiffs. The trial judge denied the motions to dismiss, approved the addition of two plaintiffs, but reserved decision on the application for a receiver. He directed the appointment of a master to take testimony and file a report on the question of the insolvency of Independence, and enjoined Pennsylvania from transferring or otherwise disposing of

the sum of \$38,258.85 representing certain charges, income, and proceeds received in administration of the trust. 27 F. Supp. 763.

Pennsylvania, Independence, and the individual defendants appealed from these orders. The Circuit Court of Appeals did not expressly consider whether the appeals were premature. It thought that the Securities Act did not authorize a bill seeking equitable relief against a third party which has assets belonging to the vendor, and therefore, that Pennsylvania was not a proper party to the suit since no cause of action under the Securities Act was stated against it. It reversed all of the orders appealed from and remanded the cause with directions to allow petitioners to amend their complaint to state a claim for a money judgment at law against Independence only. 108 F. (2d) 51. We granted certiorari because of the importance of the questions presented. 309 U. S. 648.

We believe that the appeals from the order granting the temporary injunction were not premate e. It is true that Section 128 of the Judicial Code (28 U. S. C. § 225) authorizes circuit courts of appeals to review only final decisions. But Section 129 of the Judicial Code (28 U. S. C. A. § 227) expressly excepts from the general rule certain interlocutory orders and decrees. It provides in part: "Where, upon a hearing in a district court . . . an injunction is granted . . . by an interlocutory order or decree

an appeal may be taken from such interlocutory order or decree to the circuit court of appeals. . . ." Thus by the plain words of Section 129 the Circuit Court of Appeals was authorized to consider the appeals from the temporary injunction. Compare Enclow v. New York Life Insurance Co., 293 U. S. 379; Shanferoke Coal & Supply Cfrp. v. Westchester Service Corp., 293 U. S. 449.

However, this power is not limited to mere consideration of, and action upon, the order appealed from. "If insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." Meccano, Ltd. v. Wanamaker, 253 U. S. 136, 141. See also Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275; Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S. 519; Mast, Foos & Co. v. Stoner Mfg. Co., 177 U. S. 485; Smith v. Vulcan Iron Works, 165 U. S. 518. Accordingly, the Circuit Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision. Reed v. Lehman, 91 F. (2d) 919; Miller v. Pyrites Co., Inc., 71 F. (2d) 804. Compare

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Respondents' motions sought to dismiss the bill because it failed to state any cause of action and because the District Court lacked jurisdiction. We hold that these motions were correctly denied.

We think the Securities Act does not restrict purchasers seeking relief under its provisions to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him. Undoubtedly any suit to establish the civil liability imposed by the Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the security. Section 12(2); 15 U. S. C. § 77(1)(2). But Section 12(2) states the legal consequences of conduct proscribed by the Act; it does not purport to state the form of action or procedure the claimant is to employ.

Moreover, in Section 22(a) specified courts are given jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter". The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the protedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires. That it does not authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under Section 12(2).

We are of the opinion that the bill states a cause for equitable relief. There are allegations that Independence is insolvent, that its business is practically halted, that it is threatened with many law suits, that its assets are endangered, and that preferences to creditors are probable. There are prayers for an accounting, appointment of a receiver, an injunction pendente lite, and for return of petitioners' payments. Other allegations show that although pe-

² Emphasis added.

titioners dealt with Independence their installments were paid to Pennsylvania and that the complicated arrangement between Pennsylvania and Independence might make it extremely difficult to obtain satisfaction of any claim established against Independence.

The principal objects of the suit are rescission of the Savings Plan contracts and restitution of the consideration paid, including recovery of the balance, held by Pennsylvania for account of Independence, which consisted in part of the payments alleged to have been procured by the fraud of Independence. That a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate, is well established. Tyler v. Savage, 143 U. S. 79; Montgomery v. Bucyrus Machine Works, 92 U. S. 257; Boyce v. Grundy, 3 Pet. 210. See Black, Rescission and Cancellation, 2d edition, § 643, et seq.; Williston, Contracts, 3d edition, § 1525, et seq.; Pomeroy, Equity Jurisprudence, 4th edition, §§ 881, 1092.

It is enough at this time to determine that the bill contains allegations which, if proved, entitle petitioners to some equitable relief. Whether or not they sufficiently allege or prove their right to all of the relief prayed in the bill we do not decide because the question is not before us. b Hence, if the District Court had jurisdiction it was proper to consider whether injunctive relief should be given in aid of the recovery sought by the bill.

We agree with the courts below that the Securities Act confers jurisdiction of the suit upon the District Court irrespective of the amount in controversy or the citizenship of the parties. Section 22(a) provides in part: "The district courts of the United States ... shall have jurisdiction ... of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." This is plainly a suit to enforce a liability or duty created by the Act. That the District Court therefore has jurisdiction is evident from the provision quoted. Accordingly, the only remaining question is whether the injunction was proper.

We hold that the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. "It is well settled that the granting of a temporary in-

⁸ In Falk v. Hoffman, 233 N. Y. 199, 202, Judge Cardozo said: "Equity will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer."

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junction, pending final hearing, is within the sound discretion of the trial court; and that upon appeal an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion." Prendergust v. New York Telephone Co., 262 U. S. 43, 50-51; Meccano, Ltd. v. Wanamaker, 253 U. S. 136, 141. As already stated, there were allegations that Independence was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate. The injunction was framed narrowly to restrain only the transfer of \$38,258.85, and the trial judge required petitioners to furnish security for any losses respondents might suffer. In view of this we cannot say that the trial judge abused his discretion in granting the temporary injunction.

We conclude that the orders granting the temporary injunction and denying the motions to dismiss were correct and should have been sustained. The orders allowing the addition of two plaintiffs and referring the issue of insolvency to a master were interlocutory and not appealable (28 U. S. C. § 225), and should have been reversed only if petitioners were not entitled to any equitable relief. See Meccano, Ltd. v. Wanamaker, 253 U. S. 136; Smith v. Vulcan Iron Works, 165 U. S. 518. The Circuit Court of Appeals properly did not consider them on the merits, and if ultimately there is an appeal from a final decree the correctness of these orders may be examined.

The decision of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Mr. Justice Douglas did not participate in the consideration or decision of this case.

4 An order allowing the addition of plaintiffs is interlocutory and not appealable: Central California Canneries Co. v. Dunkley Co., 282 Fed. 406, 410. See Oneida Navigation Corp. v. W. & S. Job & Co., Inc., 252 U. S. 521; Cyclopedia of Federal Procedure, Vol. 5, § 2608.

An order of reference to a master is generally interlocutory and not appealable, at least if not for a mere ministerial purpose: George v. Victor Talking Machine Co., 293 U. S. 377. See Latta v. Kilbourn, 150 U. S. 524; McGourkey v. Toledo, etc. Ry. Co., 146 U. S. 536; Hill v. Chicago & Evanston Railroad Co., 140 U. S. 52; Beebe v. Russell, 19 How. 283; Craighead v. Wilson, 18 How. 199; Forgay v. Conrad, 6 How. 201; Cyclopedia of Federal Procedure, Vol. 5, § 2618.